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Supreme Court of the United States

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWEISER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Petitioners,

v.

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed the district court's holding that: (1) Petitioners had no due process property interest in the unidentified remains of their deceased next-of-kin who died at the World Trade Center on September 11th; and (2) any incidental burden on Petitioners' religious practices imposed by Defendants' actions in implementing the recovery effort did not rise to the level of a Free Exercise violation, both because Defendants' actions did not target religious beliefs and because Defendants' actions were justified by a compelling government interest.

Three questions are presented:

1. Is there a due process property interest in the unidentified remains of the dead for burial purposes, where two Circuit Courts have found such a property interest in identifiable remains, the unidentifiable remains are undisputedly known to be present in a specific location, and the underlying purpose behind such a property interest – so as to allow next-of-kin to bury their loved ones in a decent and dignified manner – is still present?

2. At what point does a "special relationship" arise between a government and its citizens which provides citizens protection under the Due Process Clause?

3. Are Free Exercise rights violated when, as a result of governmental actions or policies, one is prevented from participating in that most central of religious rituals – the burial of one's dead in accordance with one's religious tenets?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported but can be found at *World Trade Center Families for Proper Burial, Inc. v. City of New York*, No. 08-3705-cv, 2009 WL 4981779 (2d Cir. Dec. 23, 2009). The Second Circuit affirmed the July 7, 2008 decision of the United States District Court for the Southern District of New York, reported at 567 F.Supp.2d 529 (S.D.N.Y. 2008). *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Second Circuit's opinion was rendered on December 23, 2009. Subsequently, on March 5, 2010, the Second Circuit denied Petitioners' timely Petition for Rehearing *En Banc*. *See* Appendix C.

CONSTITUTIONAL PROVISIONS INVOLVED

USCA Const Amend. 1-Religion.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

USCA Const Amend. XIV, § 1–Due Process.

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

PRELIMINARY STATEMENT

Few could have anticipated that, on the morning of September 11, 2001, 19 men would fly airplanes into the World Trade Center's Twin Towers, the Pentagon, and the ground in Shanksville, Pennsylvania, leaving almost 3,000 innocent individuals dead in their wake. In the aftermath of the attack, the City of New York began transporting the wreckage from the fallen World Trade Center to the Fresh Kills Landfill and commenced an effort to recover both crime-scene evidence and remains of the dead. Once the world's largest garbage dump, Fresh Kills had become notorious as a rodent-infested trash pit which, at its peak, received 13,000 tons of garbage daily.

Because we, as a society, do not contemplate leaving the remains of our dead scattered amidst household garbage in perpetuity, the issue arose of what would ultimately be done with these human remains once the recovery effort concluded. Recognizing the egregiousness of allowing the status quo to continue, the City appointed a special liaison to family members of the victims who conveyed the City's promise that these human remains would not "be forgotten" and would be "maintained with reverence." Meanwhile, high-level City officials explained to family members that certain "millings" would be laid down at Fresh Kills to segregate the World Trade Center material from the garbage, so as to assure that at some future point, the World Trade Center material could be gathered and relocated.

Almost nine years later, the World Trade Center material, containing human remains of those who died on September 11th, still sits at Fresh Kills. As a consequence, Petitioners – family members of those who were killed – have been unable, for almost nine years, to recover, bury, and commune with the remains of their children, spouses, and kin in accordance with any standard of decency or tenet of religious faith.

This deprivation the Constitution does not allow, and this case presents the Supreme Court with an opportunity to so hold. Moreover, because we, unfortunately, have probably not seen the last of such attacks, this case presents the Court with an opportunity to further define the constitutional scope of, and limitations on, government action when the government undertakes to respond to future tragic, but likely inevitable, emergency situations.

STATEMENT OF THE CASE

Two thousand, seven hundred and fifty-two people were killed at the World Trade Center ("WTC") on September 11, 2001. Petitioners are seventeen individual next-of-kin, primarily parents and spouses of those killed at the WTC, and WTC Families for Proper Burial, Inc. ("WTCFPB"), an association formed by family members for the purpose of recovering the remains of their loved ones (collectively, "Petitioners"). Defendants are the City of New York ("the City"), its Mayor, Michael R. Bloomberg ("Mayor Bloomberg"), John J. Doherty, Commissioner of the New York City Department of Sanitation, and Amanda Burden, Commissioner of the New York City Department of City Planning (collectively, "Respondents").

In the immediate aftermath of the attack, material from the WTC site ("WTC debris") was transported to Fresh Kills and placed on a hill, designated as Section 1/9, so that workers could separate the metal and steel from the WTC buildings from the remainder of the WTC debris. Early on in this process, it became apparent that the WTC debris contained many human body parts and remains of those who had perished. Accordingly, a makeshift procedure was instituted to search the WTC debris for the human body parts, remains, and personal effects of these victims.

Many of those doing the searching were current or former New York Police Department ("NYPD") or Sanitation Department employees. While these individuals searched with the best of intentions, few had any forensic or archeological training related to the task at hand. Rather, in the first month after the attack, workers arriving at Fresh Kills were handed rakes and shovels and, working in teams, were directed to search through pile upon pile of WTC debris using these rakes, shovels, and, often, their hands. Any human body parts or human remains that were discovered were placed in pails, as were personal effects like credit cards or drivers' licenses, and were eventually brought to the medical examiner's station. As a result, there was never any record of where in the WTC debris any recovered remains or materials were found.

In these first weeks after the attack, after a pile had been searched in this manner, the remaining WTC debris would be bulldozed away in order to make room for additional loads of WTC debris that were arriving daily. However, this bulldozed WTC debris still contained

human body parts and human remains, as evidenced by the increasing presence of seagulls hovering overhead, attracted by the remaining human body parts. At one point, so many seagulls were encircling the bulldozed debris that the searchers were forced to shoot bottle rockets to drive them away.

At least one person involved in the initial search process, former NYPD Sergeant John Barrett ("Barrett"), stated that supervisory personnel pressured workers to search through piles hurriedly, at the expense of accuracy. Barrett recounted an incident in which, after he refused to rush through one pile of WTC debris in order to get to two other piles, the latter two piles were simply carted away and dumped, unsearched. Barrett complained to his superiors about this incident, but to no avail.

There were other shortcomings in the search process. For example, Barrett claims he never saw anybody at Fresh Kills search the numerous steel beams from the WTC for human body parts or remains before they were loaded onto trucks and transported off-site, and that, on one occasion, after a dog handler said that his dog had smelled something on a beam, Barrett checked the beam and discovered a human thigh. As well, Theodore Feaser ("Feaser"), the Sanitation Department's Director of Mechanical Operations at the site, complained that Defendants' failure to wash muddied items recovered at Fresh Kills led to the loss of much material, but was told such washing would be too costly and time-consuming.

Cognizant of the inadequacies of the process, a number of people working at Fresh Kills, including Feaser, took the position that the hand-searched WTC debris still contained so many human body parts and remains that it should not be bulldozed away, but rather, subjected to more exacting search techniques. However, Defendants did nothing to ensure that human body parts and personal effects that remained in the WTC debris were being preserved until a month later, when a more sophisticated sifting process was implemented.

On October 14, 2001, Defendants retained Taylor Recycling Facility LLC ("Taylor"), run by James Taylor ("Jim Taylor"), and Yannuzzi Disposal Services, Inc. ("Yannuzzi") to institute an organized, mechanical recovery system designed to discover human body parts, remains, and personal effects. Yet even after Taylor and Yannuzzi arrived on the scene, searching by rake and shovel continued for two more months. Moreover, the WTC debris that was searched by rake and shovel during the first 32 days of the recovery effort was never sifted using the Taylor and Yannuzzi systems.[1]

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[1] Indeed, of the approximately 1.651 million tons of WTC debris, only about 1.05 million tons, or, 63.6 per cent, were sifted using the Taylor and Yannuzzi system. Another 191,000 tons, or, 11.6 per cent, consisted of dredge spoils from the Hudson River, which were transported to the Weeks Marina in New Jersey, and 187,000 tons, or, 11.3 per cent, consisted of steel that could not be passed through the Taylor and Yannuzzi screens. Thus, approximately 223,000 tons of siftable WTC debris – 13.5 per cent – never passed through the Taylor and Yannuzzi sifting screens, even though such technology was available and had proven to be approximately 600 per cent more effective in recovering human remains from the WTC debris.

The Taylor and Yannuzzi recovery system entailed the use of specialized sifting screens that were far more discriminating than rakes and shovels. In the nine months that followed, WTC debris was run through the Taylor and Yannuzzi screens and divided into three streams of material, labeled small, medium, and large, with each stream then being searched by NYPD officers for human body parts, remains, and personal belongings.

The WTC debris that passed through the most delicate sifting screens, which sifted material down to ¼" thick, was known as fines ("fines"). As acknowledged by the Office of the New York City Medical Examiner, these fines contained the cremated human remains of WTC victims, including small tissue particles and bone fragments.

Given the sensitive nature of the fines, Defendants and officials from the Federal Bureau of Investigation ("FBI") repeatedly assured Petitioners that, notwithstanding that the fines were being kept in the same section of Fresh Kills as household garbage, they would not be commingled with either the WTC debris or with general household waste, but instead would be segregated and ultimately transported to a place of respect for proper interment. Specifically, in July of 2002, ten months into the recovery effort, some of the Petitioners visited Fresh Kills to view the recovery effort's progress. During their visit, FBI Special Agent Richard Marx ("Marx") warned them that they would see, among other things, fines, and that these fines would look like – and essentially were – cremated remains. When Diane Horning ("Diane Horning"), one of the individual Petitioners, asked for the fines for

burial purposes, Marx responded that the fines were being kept separate from both the other WTC debris and from household garbage at Fresh Kills, but could be requested when the recovery effort concluded.

The following month, in August 2002, some of the Petitioners spoke with Dennis Diggins ("Diggins"), the Deputy Director of the Sanitation Department's Bureau of Waste Disposal. Diggins informed them that "millings" had been laid down in the areas where the fines had been placed, in order to separate the fines from the household waste stored in these areas.

Based on these conversations, Petitioners believed that the fines containing the cremated remains of their loved ones had been segregated from the household garbage at Fresh Kills. Thus, as the recovery effort drew to a close, Diane Horning sent correspondence to the Office of the Mayor and to the Sanitation Department, inquiring about the City's plans to move the remains and provide a proper and decent burial site for their deceased kin.

In response, Christy Ferer ("Ferer"), who had been appointed by Mayor Bloomberg as a special liaison to the families of WTC victims, sent an e-mail stating that it was "so painful to imagine the unidentified remains of our loved ones intermingled with the debris that remains at the landfill," and noting that she was "sensitizing City Hall to the fact that this debris cannot be forgotten and that they have to plan for its future." Ferer further noted that, while moving the hill of WTC debris at Fresh Kills would be "costly," she would "reach[ ] out to private money to see if we can finance its move if and when that

becomes an option." Ferer closed by stating that the "mound of debris" to which she was referring had "been placed into one readily identified section of the landfill reserved just for this purpose. It weighs 1.8 million tons. Officials at Fresh Kills assure me it has been set aside and maintained with reverence. The 2 visits I have made there confirmed that."

Notwithstanding Ferer's assertions, Petitioners learned that, while the recovered fines were initially segregated from other WTC debris and household garbage on a daily basis, at some point thereafter, Sanitation Department officials decided to simply recombine the fines with other WTC debris. Moreover, notwithstanding what Petitioners had been told, no millings were ever set down to separate the WTC debris (which now contained the fines) from the garbage and other waste already present at Fresh Kills, even though months had passed since the immediacy of the attack. Rather, Petitioners, through their own investigation, learned from Eric Beck, who served as Jim Taylor's Senior Supervisor at Fresh Kills, that, in the months after September 11th, the City loaded some of the fines "onto tractors, and us[ed] it to pave roads and fill in potholes, dips and ruts" on the delivery roads at Fresh Kills.

In an effort to rectify this situation, the Petitioners formed WTC Families for Proper Burial ("WTCFPB") in November of 2003 as a not-for-profit corporation

> "organized, and . . . operated exclusively for the following purposes: To retrieve human tissue remains, bone fragments and cremated

> remains of those killed on September 11, 2001 at the World Trade Center, which are currently in the Fresh Kills Landfill in Staten Island, NY. The World Trade Center (WTC) Families for Proper Burial, Inc. proposes that these retrieved remains be put into suitable containers and buried properly, with dignity, preferably at the site of the WTC memorial."

WTCFPB acts on behalf of approximately 1,000 families who lost loved ones at the WTC on September 11th. Since its inception, almost 66,000 people, including over 1,000 family member, have signed its petition to have the human body parts and human remains of 9/11 victims removed from Fresh Kills and relocated to a suitable burial site, and the association has received hundreds of endorsements from, *inter alia*, U.S. Senators and Representatives, Governors, over 150 New York and New Jersey municipalities through town resolutions, and many religious, military and civic organizations. However, neither the individual Petitioners nor the WTCFPB have been able to convince the City to simply gather and relocate the fines and WTC debris to a more appropriate site.[2]

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[2] Petitioners emphasize that, while they have, in the past, sought to have all of the WTC debris sifted using the Taylor and Yannuzzi systems, the instant Petition, and any further litigation in this action should this Petition be granted, seeks only to have the WTC debris and fines relocated to a proper burial site. That said, were the City willing to resift all of the WTC debris using the Taylor and Yannuzzi recovery system, Petitioners would be amenable to this.

The search and recovery effort at Fresh Kills concluded in August of 2002. Approximately one and one-half years later, in March of 2004, the New York City Planning Commission ("City Planning Commission") held a public meeting regarding the proposed redevelopment of Fresh Kills into a municipal park. Petitioners, who were concerned that any such redevelopment would cause their loved ones' remains to be buried at Fresh Kills forever, attended the meeting and voiced their position that allowing the body parts of their deceased family members to permanently remain in a landfill on top of household waste was unacceptable.

Notwithstanding Petitioners' objections, on July 19, 2004, the Office of the Mayor delivered a letter to WTCFPB stating that the fines would not be unearthed from their location at Fresh Kills, but promising that WTCFPB could offer input regarding the design of a monument to be located on the grounds of the planned park. The letter did not give any timetable for Fresh Kills' redevelopment, but, by the City's own estimate, this process will take thirty years – in other words, beyond the lifetime of many of the Petitioners. The letter also stated that "there is no site at present to receive the [remains]" – despite the fact that Petitioners had already discussed proposed relocation sites with numerous entities, including the State of New Jersey and the NY/NJ Port Authority, and had proposed several potential alternative sites for the WTC debris.

WTCFPB requested a meeting with Mayor Bloomberg to discuss the issues raised in the July 19, 2004 letter, but received no response. Then, at an August 2004 visit to Fresh Kills Section 1/9, WTCFPB

family members discovered that, far from being maintained "with reverence," as promised by Defendants, the area bore signs of severe erosion and tracks from large construction vehicles, and was littered with chunks of steel, shoes, tires, carpets, storm drains, and other garbage. Shortly thereafter, on August 10, 2004, Petitioners appeared before the City Planning Commission, described their recent findings, and reasserted their position that their loved ones' remains had to be unearthed and relocated before Fresh Kills could be redeveloped. City Planning Commission officials gave Petitioners verbal assurances that no further construction would occur at Section 1/9 of Fresh Kills. However, two days later, on August 12, 2004, the Sanitation Department began covering Section 1/9 with dirt as part of a final, "capping" procedure, commenced on or about September 9, 2004, to close and redevelop Section 1/9.

In October 2004, Petitioners attended another public meeting during which the City Planning Commission announced that it had ordered Section 1/9 of Fresh Kills cleaned of debris. Petitioners informed the City Planning Commission that, rather than being cleansed of garbage, the area was merely being covered with another foot of dirt, thus permanently commingling human body parts, remains, and fines with household garbage and burying both at Fresh Kills. The City Planning Commission refused to address Petitioners' assertions.

Accordingly, in October 2004, Petitioners filed a Notice of Claim with the City, seeking to assert their rights over the unrecovered remains of their deceased

loved ones. On March 11, 2005, the WTCFPB, through counsel, sent a letter to Mayor Bloomberg outlining the group's concerns about the disposition of their loved ones' remains and requesting a meeting to discuss these issues. Although Mayor Bloomberg did not meet with the group, his Corporation Counsel and Sanitation Department officials did, but to no avail.

To date, many WTCFPB family members have been and continue to be deprived of some or all of their loved ones' human remains, thus depriving them of any opportunity to possess and bury their next-of-kin in a manner of their religious, spiritual, or personal choosing.[3] Diane Horning, for example, received only her son Matthew's wallet and a fragment of his occipital skull bone, recovered from the WTC debris at Fresh Kills.

Moreover, Petitioners have been denied meaningful access to the Fresh Kills site. Simply visiting the site requires that one comply with a labyrinth of changing regulations set by Defendants, which effectively impedes Petitioners' efforts to commune with and mourn their loved ones. In 2002, for example, the Office of the Mayor notified Petitioners that, in order to visit, they had to contact that office in writing or via e-mail one to two weeks in advance, indicating who would be visiting, the visitor's relationship to the deceased, and the date and time of the proposed visit. Later, the process was

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[3] Of the 2,752 who perished at the WTC, only about 176 full bodies (6 per cent) have been recovered from the WTC debris. Partial remains of approximately 1,450 bodies (53 per cent) have been recovered, and no remains at all have been recovered for approximately 1,123 victims (41 per cent).

changed and Petitioners had to contact the Sanitation Department in order to access the site. At that point, Petitioners were told that only family members could visit, and non-family members, such as journalists or photographers, would be denied access. Diane Horning requested a written policy spelling out this rule, only to be told by a Sanitation Department employee told that no such written policy existed but that the City had unilaterally decided that journalists, "would disturb the sanctity of the space."

Once someone receives clearance to visit Fresh Kills, he or she must drive to the site, as there is no public transportation. The drive is not scenic; rather, the route is lined by recycling and methane recovery plants. At the entrance to the site, a sign announces that household waste is dumped there. Petitioners must stop at a guard booth, check in, identify themselves, and await an official escort, who leads them to Sanitation Department trailers where Petitioners sign a waiver indemnifying the City from liability should anyone be injured during the visit. Only then are Petitioners driven by Sanitation Department employees to the top of the garbage dump so that they can visit and mourn their loved ones.

Because of the rough terrain and soil erosion – sometimes as deep as four feet – children, the elderly, and the infirm cannot be brought to the site. In the summer, insects swarm overhead, and on some days, the stench of methane is too much to bear. There is no place to leave flowers, no feeling of solace or closeness to a loved one. On various visits, Petitioners have found old tires, carpeting, pieces of blistered steel and fire hose,

construction fill, glass, bolts, tiling, and shoes. It is abundantly clear that the site has not been maintained "with reverence," as promised.[4]

Procedural History

Petitioners filed a Complaint seeking to remedy their injuries in August 2005 and filed an Amended Complaint ("Complaint") in June 2006.[5] The Complaint raised six claims – two constitutional due process claims, a claim based upon New York common law, a free exercise claim, a claim based upon New York statutory law, and a negligence claim – and sought declaratory and injunctive relief, not money damages.

In October of 2006, Defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint or, in

[4] In contrast, the remains of some of the Pentagon victims, including unidentified remains that were never associated with specific victims, have been buried together in a special casket at Arlington National Cemetery, marked with a special headstone, and those who died when Flight 93 crashed to the ground in Shanksville, Pennsylvania, are being honored by the Flight 93 National Memorial, which includes a "Sacred Ground" which is the final resting place of the passengers and crew.

[5] The district court had subject matter jurisdiction over the Complaint pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), and 42 U.S.C. § 1983. In addition, the district court had subject matter jurisdiction pursuant to Section 408(b)(3) of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001), which provides that the Southern District of New York shall have exclusive jurisdiction over claims "resulting from or relating to the terrorist-related aircraft crashes" of September 11, 2001.

the alternative, for partial summary judgment pursuant to Fed. R. Civ. P. 56 on Plaintiff's second, fifth, and sixth claims. In support of their motion, Defendants submitted affidavits from several individuals involved with the recovery effort.

Petitioners opposed Defendants' motion and submitted affidavits and exhibits from both Petitioner Diane Horning and numerous individuals involved with the recovery effort. Petitioners' affidavits tell a vastly different story with respect to adequacy and thoroughness with which the Fresh Kills recovery effort proceeded, the decision-making processes in place, and the promises made to Petitioners regarding the ultimate disposition of the fines and WTC debris. Defendants filed a Reply Brief accompanied by two additional affidavits and several exhibits, which, again, paint a different picture than that painted by Petitioners' submissions.

On July 8, 2008, the district court issued its Opinion, granting Defendants' motion and dismissing the Complaint.[6] *See* Appendix B. In its Opinion, the district court held, *inter alia*, that Petitioners had not established that they had a constitutional property interest in the remains in question because said remains were unidentifiable, and that Petitioners' free exercise rights had not been violated because Defendants' actions were not targeted to infringe upon any specific religious practice and thus, any such burden was incidental. *Id.*

[6] It is not entirely clear whether the district court did so pursuant to Defendants' Rule 12(b)(6) motion or Defendants' alternative motion for summary judgment.

Petitioners timely filed their Notice of Appeal on July 25, 2008. On December 23, 2009, the Second Circuit issued a Summary Order affirming the Opinion of the district court.[7] *See* Appendix A. On January 27, 2010, Petitioners timely filed a Petition for Rehearing *En Banc*, which the Second Circuit denied on March 5, 2009. *See* Appendix C.

REASONS FOR GRANTING THE PETITION

POINT I

THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION REGARDING THE DUE PROCESS PROPERTY INTEREST IN UNIDENTIFIALBLE REMAINS OF NEXT-OF-KIN

In upholding the district court's decision dismissing Petitioners' Complaint, the Second Circuit concluded that Petitioners did not have a constitutional due process property right to possess the unidentified remains of their next-of-kin for burial purposes. At least two Circuit

[7] In so holding, the Second Circuit noted that the Petitioners had standing to bring their action because two individual Petitioners, Diane and Kurt Horning, had been given a fragment of their late son Matthew's occipital bone, recovered in the WTC debris at Fresh Kills, and that, given this, "other Petitioners' standing is not a threshold constitutional question, and we may consider the merits." *See* Appendix A at 4a-5a (*citing Rumsfeld v. Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

Courts, the Sixth and the Ninth Circuits, have found a due process property interest in the identifiable remains of next-of-kin. Thus, this case raises the important constitutional question of what to do where a property interest that would otherwise unquestioningly be present simply cannot be, not because of any fault of the putative interest-holder, but because of the circumstances that led to their loved one's death. Put another way, must family members of deceased loved ones waive an otherwise valid property interest that would enable them to bury their dead because, owing to the circumstances of the tragedy, their loved ones remains are individually unidentifiable but known to be present in a specific location?

A. *Two Circuit Courts Have Found A Constitutional Due Process Interest In The Remains Of Next-Of-Kin Based in State Law*

Both the Sixth and Ninth Circuits have concluded that the Fourteenth Amendment's Due Process Clause encompasses and protects a property interest that one has in the remains of next-of-kin. In *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and again in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), the Sixth Circuit held that a deceased's relative had a constitutionally protected property interest in the deceased's body itself. The Ninth Circuit held similarly in *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796-97 (9th Cir. 2002), concluding that parents had a property interest in the corneas of their deceased children pursuant to the Due Process Clause of the Fourteenth Amendment. *See also Melton v. Hamilton County*, 267

F.Supp.2d 859 (S.D. Ohio 2003); *Mansaw v. Midwest Organ Bank*, No. 97-9271-CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. 1998).

In so holding, the Sixth and Ninth Circuits cited this Court's decision in *Board of Regents v. Roth* for the proposition that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." 408 U.S. 564, 571-72 (1972). Rather, such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

Based on this, the Sixth and Ninth Circuits looked to state law to determine whether a constitutionally protected property interest in the remains of next-of-kin existed. In *Brotherton*, for example, the Sixth Circuit noted that, "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment." 923 F.2d at 482. In *Whaley*, the Sixth Circuit arrived at its conclusion based on Michigan statutory and common law, which granted next-of-kin the right to possess, bury, or dispose of a deceased's body and prevent its mutilation. 58 F.3d at 1116. And, in *Newman*, the Ninth Circuit found that a due property interest in human remains existed based on California statutory law granting parents the right to transfer, or refuse transfer, of their deceased children's body parts. 287 F.3d at 296.

In arriving at their decisions, it was of no moment to either court that the underlying interest granted by the relevant state was termed a "quasi-property" interest. *See Brotherton*, 923 F.2d at 482 (rights of next of kin in Ohio "form a substantial interest in the dead body, regardless of Ohio's classification of that interest"); *Whaley*, 58 F.3d at 1114 (whether substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law and, in making such a determination, "courts must look beyond the law's nomenclature and to its substance"). As the Ninth Circuit noted:

> Our holding is not affected by California's labeling of the interests of the next of kin as "quasi property," a term with little meaningful legal significance. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim or entitlement' protected by the Due Process Clause."

Newman, 287 F.3d at 297 (*quoting Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978)). Thus, so long as the relevant state law provides for a property or quasi-property interest in the remains of next-of-kin, a party can assert a constitutionally-protected property interest under the Fourteenth Amendment.

B. *New York Law Provides For A Property Interest In The Remains Of Next-of-Kin*

It is undisputed that New York has long recognized the right of next-of-kin to take immediate possession of a decedent's body and arrange for its disposition. *See Colavito v. New York Organ Donor Network, Inc.*, 356 F.Supp.2d 237, 243 (E.D.N.Y. 2005) (recognizing spouse's "quasi-property" right to possess body for purpose of ensuring proper burial); *Helmer v. Middaugh*, 191 F.Supp.2d 283, 286 (N.D.N.Y. 2002) (property interest in a deceased body is the right to possess the body for burial, control disposal of the body, and maintain claim for disturbances to the body); *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31, 877 N.Y.S.2d 300, 304 (1st Dep't 2009) ("[i]t is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial"); *Booth v. Huff*, 273 A.D.2d 576, 577, 708 N.Y.S.2d 757, 759 (3d Dep't 2000) (same); *Dick v. City of New York*, No. 607/00, 2002 WL 31844745, at *2 (N.Y. Sup. Oct. 30, 2002) ("the courts of this State have long recognized the 'quasi-property right' of a spouse or next of kin to the possession of a decedent's body, in the state that the body was in at the moment of death, for the purpose of interment, or disposal according to custom or religious belief"); *Darcy v. Presbyterian Hospital in City of New York*, 202 N.Y. 259, 262-263 (1911) (right to possess dead body for the purpose of preservation and burial belongs to surviving spouse or next of kin).

Notably, one New York appellate court, the Second Department, extended this "quasi-property right" to the

partial remains of those who died at the WTC on September 11th. *See Caseres v. Ferrer*, 6 A.D.3d 433, 434, 774 N.Y.S.2d 372, 373 (2d Dep't 2004). In so holding, the *Caseres* Court, citing the right of family members to decedent's remains, directed that the partial remains of a man killed on September 11th be given to his eldest surviving sister, noting that the "only people who have standing to seek possession of the remains for 'preservation and burial' are his surviving next of kin." *Id.* (referencing § 205.01[d] of the Rules of the City of New York, regarding a next-of-kin's right to give "instructions regarding the disposal of a decedent's remains").

Moreover, New York law makes no distinction between cremated remains and an intact body. The state's Public Health Law provides that "every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death," and defines "cremated remains" as "human remains after incineration in a crematory." *See* N.Y. Public Health L. §§ 4200(1), 4202(2) (McKinney's 1987). Following from this, New York courts have recognized the next-of-kin's quasi-property right to possession of a decedent's cremated remains. *See Roach v. Stern*, 252 A.D.2d 488, 491, 675 N.Y.S.2d 133, 135 (2d Dep't 1998) (recognizing cause of action for interfering with next-of-kin's right to dispose of cremated remains); *Schmidt v. Schmidt*, 49 Misc. 2d 498, 499, 267 N.Y.S.2d 645, 646 (Sup.Ct. N.Y. Co. 1966). Thus, under New York law, Petitioners have a property interest in the remains of their next-of-kin.

C. *The Second Circuit Wrongly Rejected Petitioners' Due Process Claim Because The Purpose Behind The Due Property Interest Can Be Effectuated Even Absent The Identification Of Remains*

In light of New York's recognition of next-of-kin's right to take immediate possession of a decedent's body and arrange for its disposition, the Second Circuit could have recognized Petitioners' due process property interests in the remains of their loved ones. It did not do so, however, instead affirming the district court's holding that, "under New York law, Petitioners do not have a cognizable property right in unidentifiable human remains."

That the circumstances of this case prevent such identification does not change the fact that Petitioners – like any next-of-kin – wish to have some remnant of their loved ones to bury, however imperfectly. In this way, Petitioners are no different than any other party who seeks to obtain the remains of their loved ones for burial purposes, and their constitutional rights should not be diminished because the circumstances of their loved ones' death limit their recovery to WTC debris containing their loved ones' remains rather than actual, specific bones.

As an initial matter, Petitioners' inability to identify the remains of their loved ones is in part the result of affirmative decisions made by Defendants that were beyond Petitioners' control. It was the City's decision to commingle the WTC debris with household garbage at Fresh Kills, notwithstanding its promises to the contrary, and to subsequently bury the WTC debris

under an additional layer of dirt and effectively trap the human remains at Fresh Kills. Indeed, part of what Petitioners seek in attempting to take discovery are answers with respect to how, when, and why such decisions were made – decisions which have wrenched at Petitioners' hearts for years and hindered their ability to find solace in their loss.

More to the point, the same rationale behind protecting a property interest in identifiable remains – to allow for a proper and dignified burial – is present here, even if the remains themselves are unidentifiable. It is undisputed that the WTC debris at Fresh Kills contains the remains of WTC victims. The City itself acknowledged this in a letter from the Office of the New York City Medical Examiner, dated January 9, 2003 (months after the recovery effort at Fresh Kills had concluded), which noted that the fines at Fresh Kills contained cremated human remains of WTC victims, including small tissue particles and bone fragments. And, in July of 2002, as the recovery effort was coming to a close, Mayor Bloomberg's liaison to the WTCFPB families conceded that human remains of WTCFPB family members were located amidst the debris at Fresh Kills and noted how "painful" it was "to imagine the unidentified remains of our loved ones intermingled with the debris that remains at the landfill."

Moreover, two Petitioners – Diane and Kurt Horning – were given a fragment of their late son Matthew's occipital skull bone, which had been found amidst the WTC debris sifted at Fresh Kills. The logical conclusion to draw from this – essentially, a *res ipsa loquitur* argument – is that at least some of Matthew's other

bone fragments and remains would have been located in nearby debris, as would many remains from the 2,576 WTC victims (or, 94 per cent) whose bodies have gone either wholly or partially missing for the last nine years. Indeed, the Second Circuit's determination that Diane and Kurt Horning had standing to bring the instant action and, "[t]hat being so, other Petitioners' standing is not a threshold constitutional question, and we may consider the merits," supports the notion that the remains of other Petitioners' next-of-kin are also buried among the WTC debris at Fresh Kills, for to find that one had standing based on the presence of "unidentifiable" remains but no property interest in said remains defies logic. *See* Appendix A at 4a 5a.

Finally, affidavits from individuals who worked on the recovery effort lend credence to the notion that many human remains are still buried at Fresh Kills. Barrett attested that, in the six weeks he sifted debris at Fresh Kills, he "must have located easily 50 or more small pieces of bone," that he discovered human body parts and human remains "[e]very day," that he estimated that, in an average month, each worker at Fresh Kills "probably located 50 pieces of human body parts and human remains each," and that, due to "consistent pressure to move quickly," the effort to recover human remains was inadequate and caused many such remains to go undiscovered. Feaser averred that, "if the City of New York unearthed, resifted, and washed the debris at Fresh Kills, Section 1/9, it would find hundreds of human body parts and human remains." And Jim Taylor, whose company's sifting machines sifted the WTC debris at Fresh Kills as of October 2001 attested, "[f]rom my own experience at

Fresh Kills and based on what I now believe happened there, I am strongly convinced that if the City of New York would unearth and resift the debris at Fresh Kills Section 1/9, they would find many human body parts and human remains."

Given the unanimity of opinion with respect to the presence of human remains amidst the WTC debris at Fresh Kills, the inability to link these remains to specific victims does not change the fact that the excavation and transfer of the WTC debris to a more dignified resting place would enable Petitioners to bury and mourn their loved ones in an appropriate fashion. Indeed, the City has asserted throughout that it knows the exact location of the WTC debris at Fresh Kills because Sanitation Department surveyors recorded daily GPS coordinates, making such excavation and transfer possible. Accordingly, this Court should grant the instant petition and consider whether, when the due process property interest in a loved one's remains is at stake, specific identification of the remains themselves is necessary where the interest's purpose may be effectuated even absent such identification.[8]

[8] Indeed, the mass grave at Arlington National Cemetery, honoring those who died at the Pentagon on September 11th, contains both identified and unidentified human remains.

POINT II

THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS RELATED TO THE SCOPE OF, AND LIMITATIONS ON, GOVERNMENTAL RESPONSIBILITY IN THE CONTEXT OF EMERGENCY SITUATIONS

In addition to the due process issue discussed *supra*, there is another pressing reason why this Court should grant certiorari in this matter. The facts and circumstances underlying the instant action were related to the terrorist attack on September 11th. While it is unfortunate (and scary) to concede, there is a significant likelihood that the United States will be beset by another such attack at some future point. Indeed, at the time of this writing, a federal court hearing was being conducted in southern Manhattan related to the most recent terrorist incident, involving a bomb planted in Times Square.

Moreover, since September 11th, the United States has endured numerous natural disasters that have occasioned a massive governmental response. In 2005, Hurricane Katrina hit the Gulf Coast, bursting New Orleans' levees and flooding 80 per cent of that city and 90 per cent of the nearby Mississippi beach towns, and leaving at least 1,836 dead and one million dispossessed in its wake. In October of 2007, a series of wildfires in Southern California destroyed 1,500 homes and 500,000 acres of land, forcing the evacuation of approximately one million people and prompting a massive federal, state and local response. And, on April 20, 2010, an explosion aboard the Deepwater Horizon offshore oil rig

caused a massive oil spill that has been leaking an estimated 5,000 gallons of oil per day into the Gulf of Mexico.

Such national emergencies, whether caused by nature or man, will undoubtedly continue to plague our country and require some manner of governmental response. Given this, just as there is a need for clarity with respect to the due process property interest in unidentifiable human remains in a world that may again present such a tragedy, so is there a need for clarity with respect to exactly what the government's constitutional due process responsibilities are – and are not – when it affirmatively assumes a duty to act in response to an emergency. This case presents the Court with an opportunity to provide such clarity.

A. *A Ruling In This Case Could Help Clarify What Constitutes A "Special Relationship" Triggering The Protections Of The Due Process Clause*

This Court's holding in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989), stands for the proposition that the Due Process Clause imposes no affirmative duty on the State to provide services or protection, but, rather, limits the State from causing deprivations of life, liberty, and property without due process of law. In so holding, the *DeShaney* Court acknowledged that a "special relationship" created or assumed by the State might give rise to an affirmative constitutional duty to protect, enforceable through the Due Process Clause, but that any such affirmative duty would arise out of the limitations imposed by the State upon the individual as a result of the special relationship.

Before the district court and the Second Circuit, Petitioners argued that the City had created and/or assumed such a "special relationship" with them because the City: (1) in the immediate aftermath of the attack, took control of the WTC debris at Ground Zero and transported it to Fresh Kills; (2) assumed jurisdiction over Fresh Kills, and the WTC debris therein, such that Petitioners had and still have no general access to Fresh Kills, but rather, must arrange any visits with the City; (3) designed, implemented, operated, and managed the recovery effort pursuant to which the WTC debris was sifted and human remains were recovered – an effort Petitioners contend was inadequate; (4) specifically appointed a liaison to the WTCFPB members, who, on behalf of the City, communicated promises with respect to how the fines and WTC debris would be segregated from the household garbage, treated and maintained; (5) violated those promises and actually co-mingled the WTC debris and fines with household garbage; and (6) made all decisions related to the proposed transformation of Fresh Kills to a park, including the decision to bury the WTC debris and fines under a layer of dirt as part of a "capping" procedure that would trap Petitioners' loved ones' remains at Fresh Kills in perpetuity.

In all of these ways, the City interposed itself between Petitioners and the remains of their next-of-kin and then limited the former's access to the latter, controlled how (and, to some extent, what) remains would be recovered, made promises regarding how it would be undertaking the obligations it had voluntarily assumed (which were later found to have been broken), and, ultimately made decisions regarding the permanent

fate of the remains. In so doing, the City affirmatively created a "special relationship" with Petitioners pursuant to which the City retained control over, and limited access to, Petitioners' property interests.

The Second Circuit and district court disagreed with this analysis. However, given the nature of the emergencies that increasingly beset our nation, it is worth asking what the government's obligations and duties would be under the Due Process Clause should it have to, for example, evacuate hundreds of individuals, relocate them to an emergency shelter in a stadium or other large setting, and undertake to secure the safety of these individuals while at the shelter. Similarly, a situation might arise in the context of an environmental disaster, where the government affirmatively undertook to curtail the cause of the disaster, only to have its efforts result in some sort of due process deprivation. In such cases, additional clarification from this Court could prove useful both in defining the contours of what constitutes a "special relationship" and in helping governmental decision-makers determine what, if any, actions should be undertaken and how such actions should be implemented so as to provide for the greatest protection of life, liberty, and property.

B. *This Case Could Clarify for Government Actors When Post-Deprivation Hearings Satisfy Due Process And When Pre-Deprivation Hearings Are Necessary*

The procedural due process prong of the Fourteenth Amendment prohibits the State from depriving an individual of his or her constitutionally protected property interest without due process of law. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986). A State violates procedural due process when it deprives an individual of a property interest without first providing some sort of hearing. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest'") (emphasis in original) [internal quotation omitted]); *Memphis Light, Gas & Water Div.*, 436 U.S. at 18 (hearing required before utility service cut off); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits).

However, courts have recognized an exception where a deprivation results "because of a random, arbitrary act by a state employee," so long as the state "provides a meaningful postdeprivation remedy." *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880 (1996) (*citing Hudson v. Palmer*, 468 U.S. 517, 533 (1984)). In such instances, post-, rather than pre-deprivation remedies have satisfied due process because "[i]t is difficult to conceive of how the State could provide a meaningful hearing

before the deprivation takes place." *Hudson*, 468 U.S. at 533. Thus, property deprivations resulting from decisions made in the rush of crisis, or by low-level officials, are countenanced so long as a meaningful postdeprivation hearing process exists. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981) (postdeprivation hearing satisfied procedural due process where decision to stop mining operation was based on discovery of immediate danger); *DiBlasio v. Novello*, 344 F.3d 292, 304 (2003) ("'random and unauthorized' exception to the requirement of a pre-deprivation hearing does not apply where the government actor in question is a high-ranking official with 'final authority over significant matters.'") [internal citation omitted].

There was nothing random or arbitrary about the decisions Petitioners are challenging. The City's decision not to use the Taylor and Yannuzzi screens to sift the WTC debris that was searched by rake and shovel during the first 32 days of the recovery effort was not made in a random or hasty fashion, but rather, by high-ranking officials during the ten-month period that followed September 11th.[9] Likewise, the City's decision to renege on its promise and commingle the WTC debris and fines with household garbage was made long after September 11th, as Petitioners were informed by federal and City officials as late as July and August of 2002 that the WTC debris was being segregated from the

[9] Petitioners note that Defendants dispute the allegation that the WTC debris that arrived at Fresh Kills during the first 32 days of the recovery effort was not sifted using the Taylor and Yannuzzi systems.

household garbage via "millings" and that the fines were being further segregated from the WTC debris. Finally, the decision to spead a layer of dirt over the commingled WTC debris and fines in August of 2004 was made years after the actual attack.

In sum, numerous monumental decisions reflecting City policies with respect to the WTC debris at Fresh Kills were made, not by low-level officials in the chaos that immediately followed September 11th, but in the calm of the months and even years thereafter, by those with significant decision-making power.[10] Notably, while Defendants allotted two years for the Fresh Kills recovery effort, those involved with the project were pressured to work quickly, and the effort was actually completed in 11½ months – leaving ample time to ensure that the WTC debris had been adequately sifted and was being properly segregated, had this been Defendants' intention.

In light of Petitioners position that they have a property interest in the remains of their next-of-kin notwithstanding the unidentifiability of the remains, the denial of such property without any sort of a hearing violates procedural due process. Accordingly, should this Court grant certiorari to consider whether unidentifiable human remains can form the basis of a property interest, the Court could then decide this issue as well.

[10] Of course, the very reason Petitioners seek discovery is to learn exactly who made these decisions and when and why, so as to give further substance to the claims in the Complaint – the very point of the discovery process.

However, even if the Court declines to address this, the instant case presents an opportunity to give further guidance related to the question of what satisfies procedural due process in an emergency context. Specifically, the Court could further clarify what constitutes a "random, arbitrary act by a state employee" reviewable at a post-deprivation hearing and what types of situations require pre-deprivation hearings. As noted *supra*, the virtual guarantee of significant future crises requiring governmental intervention renders such guidance imperative.

POINT III

THIS CASE PRESENTS AN OPPORTUNITY TO RULE ON THE FREE EXERCISE ISSUES RELATED TO THAT MOST CENTRAL OF RELIGIOUS PRACTICES – THE BURIAL OF THE DEAD

Finally, this case raises an important question in the context of Free Exercise jurisprudence, namely, how central is death and the burial ritual to religious practice? The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]," *see* U.S. Const. amend. I, and is intended to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222-23 (1963).

Petitioners wish to bury their loved ones in a manner consistent with their religious beliefs. Though burial and funeral rituals differ by faith, almost all of the world's

major religions have detailed rituals for burying and treating the dead, many of which stress the need to treat a deceased's body with respect.[11] It cannot be said that this has happened here. Rather, as a result of the "invasions . . . by civil authority," to wit, Defendants' inadequate search of, and failure to segregate, the WTC debris from common household garbage, failure to excavate and return said WTC debris to Petitioners, and failure to relocate the WTC debris containing human remains to a more respectful site, Petitioners have been denied the right to bury, honor, and mourn their loved ones in accordance with the tenets of their religious faith. In this most personal and meaningful way, Petitioners' Free Exercise rights have been substantially burdened.

The Second Circuit took a different view, applying the standard enunciated in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990), which held that any incidental burden to religious expression imposed by a general rule, policy, or statute of general applicability did not amount to a First Amendment violation. Yet the inability to bury one's loved one in accordance with one's religious tenets is no mere "incidental burden." Petitioners describe in

[11] For descriptions of the burial rituals of different faiths, *see Guidelines for Catholic Funeral Rites*, *at* http://www.dioceseofsdiego.org/Handbook/Handbook_PDFs/Liturgy8.pdf (describing Catholic burial ritual and noting that "[c]remated remains should be treated with the same respect given to the remains of a human body"); Wikipedia, *Bereavement in Judaism*, *at http://en.wikipedia.org/wiki/Jewish_funeral#_note-3* (describing Jewish burial ritual); About: Islam, *Islamic Funeral Rites*, *at http://islam.about.com/cs/elderly/a/funerals.htm* (describing Muslim burial ritual).

detail the anguish they suffer in having to travel to a former mass garbage dump just to commune with their dead. They speak of bureaucratic regulations and clearances as a precondition to any visit, a site littered with old tires, carpeting, pieces of steel and fire hose, glass, and shoes, swarming insects, and the stench of methane. Mostly, they decry the utter lack of dignity that does scant justice to their sons, daughters and spouses.

One would be hard-pressed to think of an aspect of religious practice more central than the burial of the dead. To deem the denial of the right to obtain and properly bury the remains of one's loved ones an "incidental burden" trivializes loss itself. By granting this petition and hearing this case, this Court can hold forth on what the minimal standards must be, under the Constitution, such that practices central to religious faith are secured.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Dated: New York, New York
June 1, 2010

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 23, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the twenty-third day of December two thousand and nine.

No. 08-3705-cv

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWEISER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Plaintiffs-Appellants,

v.

Appendix A

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Defendants-Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

*Amicus Curiae.**

PRESENT:

GUIDO CALABRESI,
JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
Circuit Judges.

December 23, 2009, Decided

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiffs-appellants ("plaintiffs") appeal from a July 7, 2008 order of the District Court dismissing their claims against defendants-appellees ("defendants" or "the City"). Plaintiffs are the next of kin of victims of

* The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

Appendix A

the September 11, 2001 attacks on the World Trade Center in New York and a non-profit organization purporting to represent approximately 1100 families who lost relatives on that day whose remains were never recovered. Their complaint sought declaratory and injunctive relief for alleged violations of their rights to due process of law, denial of their rights to free exercise of their religious beliefs, and violations of New York state law. The District Court described the case as follows:

> The terrorists of September 11, 2001 murdered 2,749 people in Towers One and Two of the World Trade Center. Approximately 1,100 of the victims perished without leaving a trace, utterly consumed into incorporeality by the intense, raging fires, or pulverized into dust by the massive tons of collapsing concrete and steel. Full bodies were recovered for only 292 victims, and partial remains were found for another 1,357 victims—sometimes a fragment of bone or a possession, sometimes more. City workers and contractors have inspected every bit of debris and, using sophisticated equipment, sifted the particles of debris to the extent of one-quarter inch of diameter, the space between the concentric circles of a small paper clip, with no further success. All human remains that could be identified, were identified. Only dust remains.
>
> Plaintiffs brought this lawsuit to force the City to reclaim the finely-sifted residue of the

Appendix A

> World Trade Center debris at the City's Fresh Kills landfill in Staten Island, move it to a more suitable location, and create a cemetery for the 1,100 who perished without identifiable remains. If no identifiable remains can be detected, plaintiffs argue, the ground itself has become hallowed. Plaintiffs allege that the City's failures violate their Constitutional rights to bury their deceased sons and daughters and next of kin, and that this lawsuit can bring redress.

WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 531-32 (S.D.N.Y. 2008).[1] Plaintiffs argue that the District Court erred by (1) dismissing their complaint when discovery would have revealed issues of material fact relevant to plaintiffs' due process and state law claims and (2) concluding that plaintiffs' First Amendment rights had not been violated.

Under *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), we must first ascertain whether any of the plaintiffs have constitutional standing to bring this suit. *See id.* at 94-95. Whatever questions there might be with respect to some of the individual plaintiffs and as to associational standing on the part of World Trade

1. We do not intend to suggest that every fact as described by the District Court was undisputed. To the extent that facts were in dispute, the constitutional issues before us do not depend on how that dispute is resolved.

Center Families for Proper Burial, Diane and Kurt Horning readily meet the constitutional requirements. That being so, other plaintiffs' standing is not a threshold constitutional question, and we may consider the merits. *See Rumsfeld v. Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

We conclude that the District Court did not rely improperly on material beyond the complaint or resolve any disputes of material fact in defendants' favor. *See WTC Families*, 567 F. Supp. 2d at 538 (explaining that the "disputes [of fact] are not material to the constitutional issues that are at the heart of this lawsuit"); *id.* at 534 ("I hold, with reluctance, for the suffering of the families thus affected by the events of September 11, 2001 is great, that plaintiffs are *not able to state a legally sufficient claim* for relief under the United States Constitution or under New York law." (emphasis added)). Nor have plaintiffs shown how further discovery would render their claims viable.

We also find no error in the District Court's thorough analysis of plaintiffs' constitutional and state law claims. With respect to plaintiffs' due process claims, the District Court held that, under New York law, plaintiffs do not have a cognizable property right in unidentifiable human remains. It further observed:

> It is clear, and the parties do not dispute, that the attacks of September 11, and the

consequences, were unprecedented. There was no protocol on how to respond to the catastrophe suffered by the City. The collapse of the twin towers left a gaping hole in the City's skyline; the City's financial markets were paralyzed; an impenetrable smog infected lower Manhattan; fires had to be extinguished; and 1.6 million tons of debris had to be moved. In an amazing burst of patriotism, workers appeared on the site hours after the attacks, and the City marshaled contractors and workers to perform vital and immediate tasks of rescue, salvage and rehabilitation: (1) to search for survivors; (2) to search for remains or personal effects of victims; (3) to preserve evidence of the terrorists' criminal conduct; and (4) to clear debris and toxins from downtown Manhattan so that residents and businesses could again begin to function. It was important that the City move quickly, carefully and efficiently to satisfy these goals.

Clearly, the City acted responsibly, without "reckless or deliberate indifference that would shock the conscience[."] Plaintiffs have cited no evidence and made no allegation that Defendants acted with any such malevolent or reckless intent. Even if I were to assume that plaintiffs' allegations concerning the sifting of debris are true, it is clear that the City sought through all of its actions to bring about a swift and efficient recovery from the terrorists'

> attack. Plaintiffs' amended complaint evidences a dissatisfaction with the way in which the recovery effort was executed, but this dissatisfaction is not sufficient to establish a violation of plaintiffs' constitutional rights. *See Lombardi v. Whitman*, 485 F.3d 73, 84 (2d Cir. 2007) ("[S]ubstantive due process liability should not be allowed to inhibit or control policy decisions of government agencies, even if some decisions could be made to seem gravely erroneous in retrospect"). At most, plaintiffs' allegations with regard to the Defendants' handling of the fines amounts to a lack of due care, and a lack of due care is not enough to establish a due process violation. *See Daniels* [*v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)]. Consequently, Counts 1 and 2 of the amended complaint are dismissed.

Id. at 538-39 (footnote omitted). We find no error in this reasoning. To the extent the scene depicted in plaintiffs' complaint "shocks the conscience," it does so because of the magnitude of the events that occurred on September 11, not because of the City's response. As the District Court found, these municipal actions and decisions represent, at most, a lack of due care. Even after the atmosphere of emergency had dissipated, affording a greater opportunity for "actual deliberation," the City's conduct does not amount to "deliberate indifference" to plaintiffs' rights. *Pabon v. Wright*, 459 F.3d 241, 251 (2d Cir. 2006).

Appendix A

We also agree with the District Court that the City's procedures relating to the recovery effort after September 11 "did not target religious beliefs," and that "[t]he governmental interest in clearing the debris of the World Trade Center efficiently and economically" was compelling. *Id.* at 540-41. We need not dwell on the level of scrutiny applicable to the City's actions. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)), *with Skoros v. City of New York*, 437 F.3d 1, 39 (2d Cir. 2006) ("Absent [purposeful targeting of religion], a Free Exercise claim will be sustained only if the government has placed a substantial burden on the observation of a central religious belief, without a compelling government interest justifying the burden" (internal quotation marks and brackets omitted)). Because we are satisfied that the City's interest was compelling, plaintiffs' free exercise claim fails under any standard. Finally, we find no error in the District Court's dismissal of plaintiffs claims brought pursuant to New York law. *See WTC Families*, 567 F. Supp. 2d at 541-42.

On a human level, plaintiffs' claims are among the most compelling we have ever been called on to consider. They have endured unimaginable anguish, and they seek

nothing more than the knowledge that their loved ones lie in rest at a place of their choosing. We regret that we cannot bring them solace but we echo the sentiments of the District Court:

> The events of September 11, 2001 will never be forgotten. No one knows the truth of these words more than those individuals who lost their loved ones to the attacks. In a very real sense, those individuals have suffered a wrong for which there can be no remedy. No matter the authority or power of this Court, it cannot bring back the loved ones lost, and it cannot bring peace to the plaintiffs or surcease to society's collective grief around the events of September 11, 2001.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: s/ Richard Alcantara
Richard Alcantara, Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING DEFENDANTS' MOTION TO DISMISS DATED AND FILED JULY 7, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 7243 (AKH)

WTC FAMILIES FOR A PROPER BURIAL, INC.; KURT and DIANE HORNING; ANTHONY and GLORIA INGRASSIA; ARTHUR and ARLENE RUSSO; JAGDISH and INDIRA BHUKHAN; CATHERINE and ALBERT REGENHARD; MONICA GABRIELLE; ROSEMARY CAIN; KRISTEN BREITWEISER; MINDY KLEINBERG; LORIE VAN AUKEN; and CAMILLE and WILLIAM DOYLE,

Plaintiffs,

-against-

THE CITY OF NEW YORK; MICHAEL R. BLOOMBERG, Mayor of the City of New York; JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation; and AMANDA M. BURDEN, Chair of the New York City Department of City Planning,

Defendants.

Appendix B

OPINION GRANTING DEFENDANTS' MOTION TO DISMISS

ALVIN K. HELLERSTEIN, U.S.D.J.:

The terrorists of September 11, 2001 murdered 2,749 people in Towers One and Two of the World Trade Center. Approximately 1,100 of the victims perished without leaving a trace, utterly consumed into incorporeality by the intense, raging fires, or pulverized into dust by the massive tons of collapsing concrete and steel. Full bodies were recovered for only 292 victims, and partial remains were found for another 1,357 victims—sometimes a fragment of bone or a possession, sometimes more. City workers and contractors have inspected every bit of debris and, using sophisticated equipment, sifted the particles of debris to the extent of one-quarter inch of diameter, the space between the concentric circles of a small paper clip, with no further success. All human remains that could be identified, were identified. Only dust remains.

Plaintiffs brought this lawsuit to force the City to reclaim the finely sifted residue of the World Trade Center debris at the City's Fresh Kills landfill in Staten Island, move it to a more suitable location, and create a cemetery for the 1,100 who perished without identifiable remains. If no identifiable remains can be detected, plaintiffs argue, the ground itself has become hallowed. Plaintiffs allege that the City's failures violate their Constitutional rights to bury their deceased sons and daughters and next of kin, and that this lawsuit can bring redress.

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The City denies that plaintiffs have constitutional rights to vindicate, or standing to sue, or that the City violated any constitutional or statutory rights or obligations. There are no remains to bury, the City argues, and plaintiffs have rejected the City's offers to create a memorial. The City moves to dismiss the case.

As the presiding judge, I have made repeated efforts to bring the parties to an amicable solution, without success. The City has offered a memorial, but the plaintiffs insist on a cemetery. Further postponement of the issues raised by this lawsuit will not benefit anyone. My task is to examine the pleadings challenged by the City and affidavits submitted by both sides, and, if the City is correct that there are no constitutional rights to redress, to rule accordingly.

Facts and Procedural History

The City of New York assumed control of the World Trade Center site immediately following the devastating events of September 11, 2001. The first task was to search the site for people who could be saved, but there were few. The enormous tons of tangled debris left by the collapsed buildings had to be cleared even while searching for possible survivors and the remains of those who had perished. A closed landfill at Fresh Kills, Staten Island, that long had been the City's garbage dump, was chosen as the most practicable, and perhaps only, site to receive the cleared debris. Almost immediately, beginning September 12, 2001, debris was moved there, by truck and by barge. All visible human

remains were carefully removed at every stage, wherever and whenever found, bagged and brought to City-established collecting and preserving points. At Fresh Kills, the debris was off-loaded on a hill in the landfill, subjected to close examination, and pushed down the hill to make room for the next load.

Evolution of the Debris Searching Process

The amended complaint alleges that for approximately the first month of the cleanup operation, the materials were sifted using rakes and shovels. Once the debris had been examined, it was bulldozed over the side of the hill to make room for new loads of debris. The amended complaint alleges that this initial mode of review did not sufficiently allow the Defendants to locate human remains that were commingled with the debris.

Beginning on or about October 14, 2001, Defendants retained Taylor Recycling Facility LLC ("Taylor") and Yannuzzi Disposal Services, Inc. ("Yannuzzi") to use machinery to sift through the debris. The mechanized sorting process sifted debris to one-quarter inch in diameter, and was far more effective in locating human remains than the process previously used. The amended complaint also alleges that the debris that was examined using rakes and shovels during the first month of the cleanup effort was never reexamined using the Taylor and Yannuzzi machinery. The amended complaint alleges that of the 1.651 million tons of debris that was moved to Fresh Kills, only 1.05 million tons were searched using the mechanized process. According to the amended

complaint, of the 601,000 tons that were not mechanically searched, approximately 187,000 tons were comprised of steel, leaving 414,000 tons "unsifted". Defendants' affidavits take issue with these assertions, and attest that the "unsifted" debris was re-sifted after the mechanized process was implemented.

Treatment of Fines from the World Trade Center Site

The amended complaint alleges that material that remained after sifting, the "fines", contained undetectable particles of human remains. Plaintiffs allege that they were repeatedly assured by Federal and State officials that the fines would be kept separate from the remainder of the debris and would eventually be transferred to a more appropriate location. Instead, plaintiffs allege, the fines were mixed with the garbage in the Fresh Kills dump.

In July 2002, family members of 9/11 victims visited the Fresh Kills landfill, and were allegedly told by a recovery worker that millings, or dividers, had been put down to separate the fines from the rest of the debris. The family members sent a letter to the Office of the Mayor and the Department of Sanitation, inquiring whether there were plans to move the fines to a more appropriate location. Plaintiffs allege that in July 2002, Christy Ferer, Mayor Bloomberg's liaison to the family members, responded via letter stating that options for suitable locations for the fines were being considered, and that the fines were being "set aside and maintained with reverence".

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The amended complaint alleges that, in contrast to what plaintiffs were told, the fines were not kept separate, and the City did not formulate a plan to remove the fines from Fresh Kills to a more suitable location. The amended complaint acknowledges that the City claims that costs would be prohibitive, but alleges that the City's calculations are inflated.

Formation and Activities of WTC Families

In November 2003, WTC Families For a Proper Burial, Inc. was incorporated as a not for profit corporation under the laws of New York, with the stated purposes of representing the bereaved families, retrieving the remains of 9/11 victims located at Fresh Kills, and providing a proper burial and resting place for the remains. WTC Families purports to act on behalf of approximately 1,100 families who lost relatives in the September 11 attacks but whose remains were not found and, therefore, may be mixed with the debris brought to Fresh Kills. The WTC Families claims that these 1,100 families signed a petition in support of WTC Families, as did 62,500 others. The President of WTC Families, Diane Horning, lost her son, Matthew D. Horning, in the 9/11 attacks. Matthew's wallet and a piece of his occipital bone were recovered from the debris at Fresh Kills and returned to Ms. Horning by the City.

In March 2004, plaintiffs attended a meeting of the City Planning Commission. At this meeting, a proposal to turn Fresh Kills into a public park was discussed. The plaintiffs asserted at that meeting that they would not

accept any decision to leave the fines at the Fresh Kills site. In July 2004, plaintiffs received a letter from the Office of the Mayor informing them that the City had decided that the fines would not be removed from the Fresh Kills site. The letter invited plaintiffs to become involved in the design of a monument in honor of the World Trade Center victims to be displayed in the park. The plaintiffs wrote to request a meeting to discuss the issue, but the letter was not acknowledged.

In August 2004, plaintiffs visited the Fresh Kills site, and observed that Sections 1 and 9, the areas where the fines were located, were littered with other debris. On August 10, 2004, the plaintiffs appeared before the Commission arguing that the City was required to move the remains before the development of a park began. They allege that the Commission told them that Sections 1 and 9 would not be disturbed. However, in September 2004, plaintiffs learned that Sections 1 and 9 were being covered with dirt, and would no longer be kept separate from other materials. In October 2004, the plaintiffs again attended a Commission meeting, where they complained that Sections 1 and 9 were not being maintained properly. Plaintiffs allege also that they have been denied meaningful access to the site, because visits are conditioned on permission of the Department of Sanitation and waivers of health hazards arising from such visits, and because journalists and professional photographers are denied access to the site.

Appendix B

Procedural History

In October 2004, plaintiffs filed a Notice of Claim against the City. In August 2005, plaintiffs filed their complaint in this Court, alleging violations of their Constitutional rights and of New York State law. In June 2006, plaintiffs filed an amended complaint. In October 2006, Defendants filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative, for partial summary judgment on the second (due process), fifth (violation of New York State conservation and burial laws) and sixth (violation of New York State law) claims because, the defendants argue, the factual allegations underlying the claims are untrue. Plaintiffs opposed both motions. When extensive efforts to settle the dispute, before and after the motions were filed, were not successful, I scheduled oral argument on February 22, 2008.

I hold, with reluctance, for the suffering of the families thus affected by the events of September 11, 2001 is great, that plaintiffs are not able to state a legally sufficient claim for relief under the United States Constitution or under New York law. Consequently, defendants' motion is granted, and the Complaint is dismissed.

Appendix B

Jurisdiction

The amended complaint alleges that this Court has federal question jurisdiction over the claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 42 U.S.C. § 1983, and under the Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. § 40101, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the state law claims. I hold that subject matter jurisdiction exists.

The Federal Constitutional claims clearly are before me 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treatises of the United States."). Furthermore, the ATSSSA provides for exclusive jurisdiction in the Southern District of New York over claims "resulting from or relating to the terrorist-related aircraft crashes" of September 11, 2001, ATSSSA, section 408(b)(3), and these are such claims. Plaintiffs are bereaved because of the terrorist-related aircraft crashes of September 11, 2001, and their claims that their rights to arrange for a proper burial of their loved ones under New York State law are within this Court's exclusive jurisdiction. And due to the similarity between the federal and state law claims and the facts giving rise to both, the state law claims are properly before me also pursuant to 28 U.S.C. § 1367 ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution").

Appendix B

Discussion

1. *Standing*

Defendants challenge the associational standing of WTC Families. In order to establish associational standing, members of the association or group must have standing in their own right. *Bldg. & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006). The association must also show that the interests that the association seeks to protect are germane to the organization's purpose and that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

In order to establish individual standing, a plaintiff must show that: (1) she has suffered an injury in fact, meaning that the injury is both (a) concrete and particularized and (b) actual and imminent, as opposed to hypothetical and conjectural; (2) the injury is fairly traceable to the actions of the defendants; and (3) it is likely, rather than speculative, that the injury will be redressed by a favorable outcome. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Defendants argue first that the amended complaint fails to allege sufficient facts about the WTC Families members to show that WTC Families has standing to sue. The amended complaint alleges that the WTC

Families "is acting on behalf of approximately 1,100 families whose relatives died at the World Trade Center", but otherwise provides no information regarding the membership. Thus, it is not known to what extent those 1,100 families actually support the aims of the lawsuit: disinterring whatever undetectable remains that are mixed with the tons of dirt at Fresh Kills, moving the dirt to some other location, and creating a cemetery, as opposed to leaving things undisturbed and creating a suitable memorial to those who died. For every supporter of the lawsuit, there may be a small or large contingent—perhaps a majority—that would prefer to leave things in place and end recurring causes of grief. In addition, the amended complaint alleges that family members on behalf of only 1,100 of the 2,457 victims for whom partial or total remains are missing have come forward in support of the WTC Families' objectives. This means that the majority of victims' family members are not supporters or members of WTC Families.

Defendants argue that since relief affects everyone who was a victim and their next of kin, next of kin of all victims, rather than just of a subset, must be the plaintiffs; fewer than all interested parties cannot have standing to sue, except as a class certified to represent all similarly situated.[1] In *Comite En Memoria Del Vuelo*

1. Indeed, given the potential of disparate interests, serious questions exist as to whether common questions outweigh individual questions and whether members of the WTC Families and individual plaintiffs can satisfy the typicality requirement, casting doubt on whether a class could be certified in this case.

587 Inc. v. Hirsch, 100382/2005 (2005) (unpublished opinion), family members of individuals who died when American Airlines Flight 587 crashed into Belle Harbor, Queens formed a Plaintiff Committee and sued the City for unidentifiable remains of the victims. The New York Supreme Court dismissed the plaintiffs' complaint, holding that the Committee lacked standing because they had not alleged sufficient facts to show that any individual plaintiff had standing, and also expressed concern that there was no evidence that the relief sought by the Plaintiff Committee was embraced by the majority of victims' families, and "no safeguards ha[d] been shown to have been established to protect the interests of the other victims' families". *Hirsch*, at 3.

Defendants also challenge WTC Families' standing on the ground that no family member can definitively show actual injury. Because the fines at the World Trade Center site are materials of 1/4 of an inch or smaller, and are unidentifiable and undifferentiated, it is pure speculation to argue that the remains of a relative of any individual WTC Families' member may be found among the fines. Although, under New York law, there is a quasi-property right in the remains of a loved one, *see Caseres v. Ferrer*, 6 A.D.3d 433, 774 N.Y.S.2d 372 (N.Y. App. Div. 2004), here there are no identifiable remains to which a property right could attach, only an undifferentiated mass of dirt. Furthermore, no individual family member can establish that his or her family members' remains are among the fines at Fresh Kills, for they may have been entirely consumed by the intense fires. Defendants argue that where there is nothing

tangible, there are no remains, no actual injury, and no standing.

Plaintiffs argue that since some remains were found at the World Trade Center site—for example, Diane Horning's son's wallet and occipital bone—"[t]he logical conclusion to draw . . . is that at least some of Matthew's other bone fragments and remains would have been located in nearby debris, as would many remains from the 2,457 victims whose bodies have gone partially or completely missing".

I doubt that plaintiffs have adequately alleged, or could adequately allege, standing for all the reasons advanced by Defendants. In an ordinary case, that would end the matter. *Ross v. Bank of Am., N.A. (USA)*, 524 F3d 217, 222 (2d Cir. 2008). "Standing is one of the essential prerequisites to jurisdiction under Article III." *Crow Creek Sioux Tribe v. Brownlee*, 356 U.S. App. D.C. 327, 331 F3d 912, 915 (D.C. Cir. 2003). Standing is a threshold inquiry, and an indispensable part of a plaintiff's case; failure to establish standing generally obviates the need to consider the merits of a dispute. *See Medalie v. Bayer Corp.*, 510 F3d 828, 829 (8th Cir. 2007).

But this is no ordinary case. The aftermath of the events of September 11 is still being played out, in this Court and in countless personal lives. The WTC Families was created for a specific purpose—to challenge the decisions made by the City and its officials regarding the manner in which the debris cleared from the World

Trade Center and brought to Fresh Kills was handled. WTC Families, and the individual plaintiffs whose lives were turned on end on September 11, deserve consideration, on the merits. Society owes them no less. Moreover, any concerns that plaintiffs do not speak for others similarly situated, or might even be opposed by some, is lessened by the fact that no interested person has come forward in opposition to the WTC Families' objectives, notwithstanding the large amount of publicity that this case has received. *See, e.g.*, Alan Feuer, *Judge Hints He May Reject 9/11 Families' Plea To Sift Fresh Kills Remains*, N.Y. Times, Feb. 23, 2008. Consequently, I proceed to the merits.[2]

2. *Due Process Claim*

Counts 1 and 2 of the amended complaint allege that plaintiffs' constitutional rights to due process have been violated. Plaintiffs seek redress pursuant to 42 U.S.C. § 1983.

2 Defendants also challenge the WTC Families' amended complaint for failing to join all necessary and dispensable parties, R. 19, Fed. R. Civ. P. Defendants' arguments on this issue are similar to those raised in their standing challenge, i.e., that all next of kin of 9/11 victims have not been joined as parties, and because the relief WTC Families seek cannot be granted without affecting the rights of the non party family members, the non party family members are indispensable and the litigation cannot go forward without them. For the same reasons that I reject the defendants' standing arguments, I reject also their arguments raised under Rule 19.

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The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law". To establish a violation, a plaintiff must first identify the constitutional right at stake, and then allege that the deprivation was "arbitrary in the constitutional sense". *Lowrance v. Achtyl*, 20 F3d 529, 537 (2d. Cir. 1994).

Plaintiffs allege in their amended complaint that defendants' actions in commingling the remains of their loved ones with the other debris from the World Trade Center site, and permanently leaving those commingled remains at Fresh Kills, violated their rights to the remains of their loved ones, including the right to provide their loved ones with a proper burial. Plaintiffs allege also that the Defendants failed to re-search through the debris moved to Fresh Kills before the mechanized process was instituted (an allegation which Defendants factually contest), and that this alleged failure violated their due process rights.

State law defines the contours of constitutionally protected property interests. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). New York law recognizes a quasi-property right of the next of kin in the remains of a deceased for the purposes of ensuring a proper disposal of the remains. *Colavito v. New York Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 243 (E.D.N.Y. 2005). The right is not a property right in the ordinary sense of the term; rather the right extends only as far as necessary to entitle the next of

kin to protection from violation or invasion of the place of burial, and to protect the next of kin's right to ensure a proper burial. *Kellogg v. Office of the Chief Med. Exam'r of the City of New York*, 6 Misc. 3d 666, 791 N.Y.S.2d 278, 281 (N.Y. Sup. 2004); *A.F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 127 Misc. 558, 217 N.Y.S. 413, 418 (N.Y. Sup. 1926).

This "quasi-property right" has been extended to identifiable, recoverable bodies of next of kin. *See, e.g.*, *Kellogg*, 791 N.Y.S.2d at 278 (claim for unauthorized autopsy); *Correa v. Maimonides Med. Ctr.*, 165 Misc. 2d 614, 629 N.Y.S.2d 673 (N.Y. Sup. 1995) (claim for lost body of stillborn infant). No case has extended such a right to an undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being. The plaintiffs have not found any such case, and neither have I. Without something tangible or identifiable, there is no property right. *See Hirsch*, at 3.

Plaintiffs also must satisfy a second prong of argument, that the deprivation of their rights rose to the level of egregious or arbitrary conduct that shocks the conscience, if the actions of the Defendants were carried out under exigent circumstances. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). If the Defendants' actions were carried out under other than exigent circumstances, and if more reasoned reflection was available to the Defendants, then reckless or deliberate indifference may suffice to establish a due process

violation. *Pabon v. Wright*, 459 F3d 241, 251 (2d Cir. 2006). Under either standard, mere lack of due care does not rise to the level of a substantive due process violation. *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986); *Daniels v. Williams*, 474 U.S. 327, 332, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Pabon*, 459 F3d at 250.

Defendants argue that they acted reasonably and properly in subjecting the World Trade Center debris to state-of-the-art filtering. If fault can be charged, the City maintains, the fault cannot be worse than negligence. *See Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (holding that mere lack of due care does not give rise to a constitutional due process violation). Plaintiffs argue that these contrasting contentions require an individualized inquiry and that it is inappropriate to dispose of the claim on a motion to dismiss. *County of Sacramento*, 523 U.S. at 850.

The parties dispute a number of facts and events. Plaintiffs contend that the debris initially moved to Fresh Kills was not re-sifted by the state-of-the art sifting machinery that was later introduced; the City maintains that re-sifting did occur. The affidavits on the issue are not sufficiently clear, and I am unable to resolve the issue on motion. Plaintiffs contend that the City made promises that it did not keep, as to keeping the fines separate from garbage and debris. The parties dispute the cost of moving the fines to another area. And there may be additional facts that are disputed.

Appendix B

However, these disputes are not material to the constitutional issues that are at the heart of this lawsuit. It is clear, and the parties do not dispute, that the attacks of September 11, and the consequences, were unprecedented. There was no protocol on how to respond to the catastrophe suffered by the City. The collapse of the twin towers left a gaping hole in the City's skyline; the City's financial markets were paralyzed; an impenetrable smog infected lower Manhattan; fires had to be extinguished; and 1.6 million tons of debris had to be moved. In an amazing burst of patriotism, workers appeared on the site hours after the attacks, and the City marshaled contractors and workers to perform vital and immediate tasks of rescue, salvage and rehabilitation: (1) to search for survivors; (2) to search for remains or personal effects of victims; (3) to preserve evidence of the terrorists' criminal conduct; and (4) to clear debris and toxins from downtown Manhattan so that residents and businesses could again begin to function. It was important that the City move quickly, carefully and efficiently to satisfy these goals.

Clearly, the City acted responsibly, without "reckless or deliberate indifference that would shock the conscience".[3] Plaintiffs have cited no evidence and made no allegation that Defendants acted with any such malevolent or reckless intent. Even if I were to assume that plaintiffs' allegations concerning the sifting of debris

3. This is a finding as to this case alone. The cases of the workers alleging respiratory injury and concerns arising from negligence and other fault by the City and its contractors, collected under 21 MC 100, raise different issues.

are true, it is clear that the City sought through all of its actions to bring about a swift and efficient recovery from the terrorists' attack. Plaintiffs' amended complaint evidences a dissatisfaction with the way in which the recovery effort was executed, but this dissatisfaction is not sufficient to establish a violation of plaintiffs' constitutional rights. *See Lombardi v. Whitman*, 485 F.3d 73, 84 (2d Cir. 2007) ("[S]ubstantive due process liability should not be allowed to inhibit or control policy decisions of government agencies, even if some decisions could be made to seem gravely erroneous in retrospect"). At most, plaintiffs' allegations with regard to the Defendants' handling of the fines amounts to a lack of due care, and a lack of due care is not enough to establish a due process violation. *See Daniels*, 474 U.S. at 331. Consequently, Counts 1 and 2 of the amended complaint are dismissed.

3. *First Amendment Free Exercise Claim*

Plaintiffs allege, in Count 4 of the amended complaint, that they were denied their right to free exercise of their religious beliefs, guaranteed by the First and Fourteenth Amendments of the United States Constitution. Plaintiffs allege that the mixing of fines with other debris, and the refusal of the City to segregate and move the fines to a proper reverent place deprived plaintiffs of their right to bury their loved ones in accordance with their religious dictates, in contravention of the Free Exercise Clause of the First Amendment. Defendants move to dismiss the claim for failing to state a legally sufficient claim for relief.

Appendix B

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Plaintiffs argue that the City's policies and practices with respect to the fines qualify as State action that deprives them of their rights to the free exercise of their religious beliefs in burying their family members who perished at the World Trade Center.

There is no constitutional case that applies this proposition to an undifferentiated mass of debris. The debris of the World Trade Center, stained with the memories of those who perished at their desks and in the corridors and stairwells of the Twin Towers, could well have been considered hallowed. But once the City assumed the quintessential municipal task of clearing the site of debris, the policies and procedures that were adopted had to be sensitive to a myriad of considerations: efficiencies and economies of operations; the practicalities of finding a site for the tangled mountain of 1.6 million tons of debris; the continuing search for identifiable remains, even such that were as small as the space between the two concentric ovals of a paper clip; the safety of workers sifting debris that could well be actively contaminating; and others. Considerations had to be given also to the Fresh Kills site, whether to leave it as a dump, or create a park and natural habitat, with a meaningful memorial to those who perished and who may be remembered where it can be said that their spirits have come to rest.

Appendix B

There is no allegation, and there can be no allegation, that the City's purpose in implementing these municipal concerns was to infringe on anyone's religious sensibilities. A burden incidentally imposed by a general rule, policy or statute does not violate a person's First Amendment rights to religious expression. *Employ. Div. Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 881, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). If the policy has a rational basis, there is no constitutional violation. *Leebaert v. Harrington*, 332 F3d 134, 143 (2d Cir. 2003). Similarly, if the rules, policies, or statutes in question do not target, and are not motivated to prohibit, a particular religious practice, a First Amendment claim cannot prevail. *Bronx Household of Faith v. Cmty Sch. Dist. No. 10*, 127 F3d 207, 216 (2d Cir. 1997); *United States v. Amer*, 110 F3d 873, 878 (2d Cir. 1997).

For example, in *Bronx Household of Faith*, the Second Circuit affirmed the district court's grant of summary judgment for the defendants rejecting a first amendment free speech claim. In the case, the Bronx Household of Faith, an evangelical Christian church, sought to use a public school gymnasium for the purpose of conducting religious services every Sunday. The request was denied by the school board due to New York Education Law Section 414, which does not list religious worship among the permitted uses of a public schoolhouse, and New York City Board of Education policy promulgated pursuant to Section 414, which states that use of public school premises by outside religious organizations to conduct religious worship or instruction is prohibited, although use of the facilities

for discussion of religious material, or material with a religious viewpoint, is permitted. *Id.* at 210-11. The Bronx Household of Faith claimed that Section 414 and the Board of Education's policy impermissibly singled out religious services and instruction for exclusion. The Second Circuit rejected this argument, holding that the law and policy were permissible because it did "not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion." *Id.* at 216.

Likewise, in *United States v. Amer*, the Second Circuit rejected a Free Exercise Clause challenge to the International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204, which prohibits a parent from removing a child from the United States, or keeping a child outside the United States, with the intent to interfere with and obstruct the other parent's right to physical custody. 110 F3d at 873. Defendant, a Muslim, challenged the IPKCA on the ground that it interfered with his ability to return his children to their birth country to "provide them with a proper Muslim upbringing" in violation of his rights under the Free Exercise Clause of the First Amendment. *Id.* at 879. The Second Circuit rejected this argument because the IPKCA is a neutral law of general applicability, with only an incidental burden on religious practice. *Id.* Like *Bronx Household* and *Amer*, the City's procedures in moving through the debris did not target religious beliefs.

Appendix B

Plaintiffs argue that the "rational basis" test enunciated by the United States Supreme Court in *Smith* has been changed by the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* That statute prohibits the government from substantially burdening a person's free exercise of religion, even if the burden is the result of application of a rule of general applicability, unless the government can demonstrate that the burden is (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that compelling governmental interest.

Even if I were to apply the first prong of the RFRA, and even assuming that there is a constitutional First Amendment right to compel the City to move a mass of earth and create a cemetery for people whose remains cannot be identified in that mass of earth, plaintiffs cannot prevail. The governmental interest in clearing the debris of the World Trade Center efficiently and economically was "compelling," and the sensitivities evident in the sifting process were praiseworthy. And the second prong of the RFRA test — the "least restrictive means of furthering that compelling governmental interest" — is not applicable to a case where the plaintiffs seek to compel the government to do something affirmative, at taxpayer expense.[4] *See Skoros v. City of New York*, 437 F.3d 1, 39

4. Indeed, the Supreme Court invalidated the heightened standard of the RFRA as an invalid exercise of Congress's § 5 enforcement power, and confirmed that neutral laws, regulations and policies of general applicability that have only an incidental effect on religion need not be held to a standard

(Cont'd)

(2d Cir. 2006) ("Just as government may not compel any person to adopt a prescribed religious belief or form of worship, no person may require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that or his or her family.").

Furthermore, I disagree with plaintiffs' proposition that the "rational basis" test of *Smith* is not applicable. I understand the importance of proper and respectful burial in numerous religious faiths. I sympathize deeply with plaintiffs' grief in not being able to bury their loved ones in conformity with the dictates of their religions. Nonetheless, there is no question that the task of clearing the debris of the World Trade Center was a monumental and unprecedented task. A more stringent test than "rational basis" would not be appropriate.

The City's actions satisfy both a "rational basis" and a "compelling interest" test. Count 4 of the Amended Complaint is dismissed as well.[5]

(Cont'd)

higher than rational basis scrutiny. *See The City of Boerne v. Flores*, 521 U.S. 507, 533-35, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

5. Plaintiffs also argue that the Defendants' actions must be reviewed under a stricter standard because Plaintiffs' raise a "hybrid claim", i.e., Plaintiffs allege that Defendants' actions violate more than one Constitutional right. This claim is without merit. Rational basis scrutiny is all that is required on Plaintiffs' First Amendment claim, regardless of what other Constitutional claims Plaintiffs allege.

Appendix B

State Law Claims

Counts 3, 5 and 6 of the Amended Complaint allege claims under New York State Law. Defendants move to dismiss these as well.

Plaintiffs allege in Count 3 that they have a right to possess and bury the bodies of their next of kin. Plaintiffs allege in Counts 5 and 6 that Defendants' failure to re-sift through the approximately 414,000 tons of debris moved to Fresh Kills during the first month of the clean up operation violates "the meaning and intent of the laws of the State of New York relating to Conservation and Burial laws" and constitute wrongful and negligent acts under New York State law. Plaintiffs' brief clarifies that Count 5 is brought under New York Public Health Law § 4200, which provides, "every body of a deceased person within this state, shall be decently buried or incinerated within a reasonable time after death".

As discussed earlier in this opinion, this case concerns a total and complete absence of identifiable remains of any identifiable person. And just as that crucial fact was fatal to plaintiffs' Constitutional claims, it is fatal as well to plaintiffs' state law claims. Plaintiffs' New York State claims under the conservation, burial and/or public health laws cannot succeed because without identified remains of an identifiable deceased, there is no person, or part of a person, and there can be no right, to bury. And as I held in the discussion of plaintiffs' due process claim, plaintiffs have no property

right in an undifferentiated, unidentifiable mass of dirt that may or may not contain the remains of plaintiffs' loved ones. *See Colavito v. New York Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 243 (E.D.N.Y. 2005); *Kellogg v. Office of the Chief Med. Exam'r of the City of New York*, 6 Misc. 3d 666, 791 N.Y.S.2d 278, 281 (N.Y. Sup. 2004); *A.F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 127 Misc. 558, 217 N.Y.S. 413, 418 (N.Y. Sup. 1926).

Moreover, plaintiffs in their complaint seek to have the fines currently resting at Fresh Kills removed and buried in a different location, to be made available by the City and at the expense of the City. Thus, plaintiffs seek to prevail upon the City to undertake the expense of moving many tons of debris and dirt and burying it in some other location. Nothing in the laws of New York requires such efforts. The City is under no obligation to provide property to certain of its citizens for burial of their loved one's remains, however worthy the citizen and however honorable the deceased. For this reason, too, plaintiffs' state law claims fail.

Furthermore, it is clear that defendants were confronted with difficult and unprecedented choices. Immediate searches for trapped individuals, rescue operations, and emergency medical care had to be organized The tangled mountain of debris at the World Trade Center had to be removed, and a site had to be found where the debris could be deposited. Procedures for separating the different components of the debris, and for trucking and barging these components had to

be devised. Safeguarding workers in a very dangerous work site, and against the ever-present contaminants had to be a priority. And there had to be a continuous search for human remains, and measures to collect and preserve that which was found.

The City argues that it should not be second-guessed on the choices it made to perform these functions. New York State courts have held that the doctrine of justiciability prevents litigants from challenging "[b]road policy choices", involving setting priorities and allocating finite resources, because those decisions are matters for the executive and legislative branches, not the judicial branch. *Jiggetts v. Grinker*, 75 N.Y.2d 411, 553 N.E.2d 570, 572, 554 N.Y.S.2d 92 (N.Y. 1990); *see also Klostermann v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 593, 475 N.Y.S.2d 247 (N.Y. 1984) ("Generally, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches of our tripartite system"). Specifically, the choices made by the City in how to sift the debris to reduce the chances of overlooking human remains, and where to off-load and move the debris thus sifted, were difficult and complicated decisions. There was no blueprint that the City could follow in dealing with these problems. *See Dick v. City of New York*, 2002 N.Y. Misc. LEXIS 1597, 2002 WL 31844745, at *2 (N.Y. Sup. Oct. 30, 2002) ("A municipality may not be held liable for the discretionary governmental acts – i.e., conduct involving the exercise of reasoned judgment—of its public employees even when such conduct is negligent."). The

leeway that the City is afforded in dealing with the mountain of debris provides additional support to my holding to dismiss plaintiffs' state law claims.

Conclusion

The events of September 11, 2001 will never be forgotten. No one knows the truth of these words more than those individuals who lost their loved ones to the attacks. In a very real sense, those individuals have suffered a wrong for which there can be no remedy. No matter the authority or power of this Court, it cannot bring back the loved ones lost, and it cannot bring peace to the plaintiffs or surcease to society's collective grief around the events of September 11, 2001.

Not every wrong can be addressed through the judicial process. The grave harm suffered by the plaintiffs in this case is undeniable. But the jurisdiction of a court is limited. Here, my duty under the law is to determine whether plaintiffs have stated a legally sufficient claim of violation of the United States Constitution and of New York State law. For the reasons discussed in this opinion, I hold that plaintiffs have not stated, and cannot state, legally sufficient claims, and I dismiss plaintiffs' amended complaint.

The City has a plan for a beautiful nature preserve and park at the Fresh Kills site. There is room for a memorial on a height with a view of where the Twin Towers stood. The energy applied to this lawsuit might well be transferred to participating in the planning of

the park and memorial. What better reverence could there be than a memorial that both recalls those who died, even without leaving a trace, and points to the tenacity and beauty of life that must go on? The terrorists sought to destroy our lives and our freedom. They failed, and a memorial in such a beautiful setting can symbolize the vital continuation of our vibrant democracy.

The Clerk shall mark the case closed, but the Court will remain open to assist the parties in working towards a suitable solution.

SO ORDERED.

Dated: July 7, 2008
New York, New York

s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 5, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of March, two thousand and ten.

Docket No. 08-3705-cv

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWEISER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Plaintiffs-Appellants,

V.

Appendix C

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Defendants-Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Amicus Curiae.

World Trade Center Families For Proper Burial, Inc., Kurt Horning, Diane Horning, Anthony Ingrassia, Gloria Ingrassia, Arthur Russo, Arlene Russo, Jagdish Bhukhan, Indira Bhukhan, Catherine Regenhard, Albert Regenhard, Monica Gabrielle, Rosemary Cain, Kristen Breitweiser, Mindy Kleinberg, Lorie Van Auken, William Doyle Sr., Camille Doyle having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk of Court

s/ Catherine O'Hagan Wolfe

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No. 09-1467

Supreme Court U.S.
AUG 5 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWIESER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Petitioners,

v.

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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August 5, 2010

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QUESTION PRESENTED

Whether New York state law, the Due Process Clause, or the Free Exercise Clause provide a right to a small minority of family members of victims of the September 11th attacks on the World Trade Center ("WTC") to compel the City of New York ("City") to excavate and relocate more than one million tons of material examined after the attacks because that minority is dissatisfied both with the manner in which the City previously searched the material for human remains, evidence, and personal effects and the City's decision not to excavate, search again, and relocate the material.

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IN THE

Supreme Court of the United States

No. 09-1467

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWIEISER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Petitioners,

v.

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents the City, Michael R. Bloomberg, John J. Doherty, and Amanda M. Burden respectfully submit this brief in opposition to the petition for writ of certiorari filed by Petitioners World Trade Center Families for Proper Burial, Inc., et al.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1-9) is unpublished but electronically reported at 359 Fed. Appx. 177, 2009 WL 4981779. The opinion of the United States District Court for the Southern District of New York (Pet. App. 10-38) is published at 567 F. Supp. 2d 529.

JURISDICTION

The Second Circuit filed its opinion on December 23, 2009. The Second Circuit denied Petitioners' petition for rehearing *en banc* on March 5, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The collapse of the WTC Twin Towers resulted in a scene of devastation unlike anything this country has ever witnessed. The City and other entities immediately engaged in an unprecedented and multi-faceted response effort: locating and aiding survivors, extinguishing fires, protecting the public and restoring order, as well as more long-term recovery efforts such as restoring essential services to the community and repairing the infrastructure of lower Manhattan. Among these numerous and sometimes competing responsibilities, City, state, and federal officials also worked tirelessly to develop and implement a thorough and dignified process to search the approximately 1.6 million tons of material that was the remnants of the World Trade Center ("WTC material") for human remains, evidence, and personal effects. This material was initially examined at the World Trade Center site (the "WTC Site" or "Ground

Zero") and then removed to the Fresh Kills Landfill ("Fresh Kills") to be further searched and to permit other critical Ground Zero recovery efforts to continue.

Petitioners—eleven families of victims of the attacks (and their association)—brought suit second-guessing the manner in which the City performed the massive search and recovery effort and claiming a constitutional right to all WTC material at Fresh Kills. The Second Circuit and the District Court concluded that neither the Constitution nor New York law provide Petitioners with a right to compel the City—at taxpayer expense—to excavate, reexamine, and relocate more than one million tons of WTC material because they are dissatisfied with the manner in which the City conducted the prior search.

The Second Circuit and the District Court held, *inter alia*, that: (1) New York law does not provide Petitioners with an enforceable interest in the undifferentiated mass of WTC material that may or may not contain the unidentifiable remains of their loved ones (Pet. App. 5-7, 34-35); (2) the City's alleged conduct in responding to the WTC collapse and searching the WTC material, as well as the City's subsequent refusal to excavate, search again, and relocate more than a million tons of WTC material, neither shocked the conscience nor amounted to deliberate indifference (Pet. App. 7, 27-28); and (3) any purported interference with Petitioners' religious rights was not sufficient to state a constitutional claim because the City's actions did not target religious beliefs and, in any event, were justified by the City's compelling governmental interest in economically and efficiently searching and clearing the WTC material (Pet. App. 8, 28-33).

The Court should deny review because the central question—whether Petitioners have an enforceable property interest in the undifferentiated mass of WTC material—is a question of New York state law. Petitioners also request review of alternative issues that neither the Second Circuit nor the District Court addressed below. Moreover, the questions presented by Petitioners do not conflict with the precedent of this Court or other courts, and will likely have limited significance beyond the unique facts of this case.

The City re-opened Fresh Kills in the immediate aftermath of the September 11th terrorist attacks to receive WTC material and to allow law enforcement officials to inspect and search the material for human remains, personal effects, and evidence. Fresh Kills was designated as a crime scene and the New York City Police Department ("NYPD"), with the assistance of the Federal Bureau of Investigation ("FBI"), New York City Department of Sanitation ("DSNY"), and other government agencies, embarked on a complex evidence-collection effort and detailed forensic investigation of unprecedented scale. Beginning in the early morning hours of September 12, 2001, material from the WTC Site began arriving at Fresh Kills by truck and, thereafter, by barge. It was taken to a hill in Fresh Kills for examination by law enforcement. At the height of the operation, approximately 1,500 people assisted in the search and recovery effort each day. Among them were forensic experts and members of FBI evidence recovery teams that worked on previous disasters and bombings such as the destruction of TWA Flight 800, the bombing of the U.S. Embassy in Nairobi, the 1993 WTC bombing, and the bombing of the Murrah Federal Building in Oklahoma City.

Because of the unprecedented magnitude of the events of September 11th, the recovery effort at Fresh Kills was an evolving process. In the first few weeks, NYPD, FBI, and other law enforcement officers would meticulously and systematically search the material by hand for human remains, personal effects, and evidence. After each search was completed, NYPD would authorize DSNY to take possession of the remaining material for placement in Fresh Kills to make room for additional material from the WTC Site.

The initial search process was modified with the introduction of different techniques and machinery. Within ten days of receiving the first load of WTC material, industrial shaker screening machines ("shakers") were incorporated into the search process to screen and sort the material. The search process was further modified within approximately the first month of the operation to introduce machines provided by Taylor Recycling LLC ("Taylor") and Yannuzzi Disposal Services, Inc. ("Yannuzzi"). Using manual searching, shakers, and the Taylor and Yannuzzi screening machines, the NYPD, FBI, United States Army Corps of Engineers, and Phillips & Jordan, Inc. (an Army Corps contractor) established a multi-faceted procedure to search the WTC material. The Taylor and Yannuzzi machines further screened and sifted material that passed through progressively smaller screens and sorted it into discrete streams of material based on size. The machines sent each of the streams onto separate conveyor belts. Any material a 1/4 inch or larger was manually examined for human remains, personal effects, and evidence by law enforcement personnel stationed alongside the conveyor belts. The finest particles (the "fines")—the materials measuring less

than a 1/4 of an inch—passed through the smallest screen on the machines and were separated by the machines to be deposited in Fresh Kills.[1]

The City took steps to ensure that all of the WTC material that arrived at Fresh Kills was thoroughly sorted, sifted, and screened. Near the conclusion of the operation, the City used previously recorded GPS coordinates to locate and excavate WTC material that was only manually searched during the first few weeks of the operation in September 2001. This material was then searched a second time by NYPD personnel using the established search processes and protocols, and where appropriate (based on the size of the materials), screened and sifted with the shakers and Taylor and Yannuzzi screening machines.[2]

By the conclusion of the recovery operation in August 2002, the City had searched more than 1.6 million tons and deposited more than 1.2 million tons of WTC material in a 48-acre portion of Fresh Kills.[3] This monumental and unprecedented effort suc-

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[1] Petitioners claim that an FBI official, as well as certain City officials, promised them that the fines would not be commingled with other searched WTC material and deposited in Fresh Kills. Pet. 2, 7-8, 29. Petitioners also assert a variety of baseless claims intended to call into question the efficacy of the effort. Pet. 6-7, 27-28. Respondents dispute these claims. But, as noted by the Second Circuit and the District Court, these disputes were not material to the lower courts' decisions. Pet. App. 5, 27. Respondents also dispute the various assertions made by Petitioners for the first time in the instant petition. Similarly, however, these disputes are irrelevant to the disposition of the petition.

[2] Petitioners do not acknowledge that the City excavated this material and searched it a second time.

[3] Certain material such as large structural steel was shipped to recyclers and not deposited at Fresh Kills.

ceeded in recovering thousands of human remains and personal effects despite the massive destruction at the WTC Site. Those remains and personal effects that could be genetically identified were returned to victims' families. Remains that could not be identified through DNA testing or other analyses are currently being preserved by the New York City Office of Chief Medical Examiner for further analysis as advanced scientific methods of testing are developed. Notwithstanding all of these efforts, the unfortunate reality is that many victims' remains simply could not be recovered or identified.

Following the WTC recovery operation, the City began moving forward with its pre-September 11th plans for the closure and redevelopment of Fresh Kills. Petitioners objected and demanded that the City excavate and relocate all of the WTC material from Fresh Kills to another location. After due consideration, the City determined that it would not excavate and relocate the more than 1.2 million tons of WTC material at Fresh Kills. In 2004, the City announced plans to develop Fresh Kills as a City park with a monument honoring the victims of the WTC attacks and the City invited the Petitioners to participate in the design of the monument. Petitioners again objected and demanded that the City remove all WTC material prior to any development of Fresh Kills.

Petitioners ultimately brought suit asserting violations of the Due Process Clause and the Free Exercise Clause, as well as New York law, arising from the City's purported improper search of the WTC material at Fresh Kills (particularly during the initial stages of the search and recovery operations), the alleged commingling and depositing of the less-

than-1/4-inch fine material with the other searched WTC material, and the City's denial of their request to excavate, resift, and relocate all of the material. Petitioners claim that the City's alleged conduct interfered with their ability to possess and bury their loved ones' remains. Petitioners sought to enjoin Respondents from proceeding further with the closure and redevelopment plans for Fresh Kills and to compel Respondents to excavate, resift,[4] and relocate the WTC material at the City's expense.

The parties met many times in an effort to bring about an amicable resolution. The City offered repeatedly to construct a memorial and to work with the victims' families on the design of the memorial. But Petitioners insisted that any settlement require that the City excavate and relocate all 1.2 million tons of WTC material at Fresh Kills to another location. As a result, the District Court's and the City's efforts to resolve the litigation proved unsuccessful. The District Court granted Respondents' motion and dismissed Petitioners' action pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 10. The Second Circuit unanimously affirmed. Pet. App. 1.

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[4] Petitioners now maintain that they are no longer seeking to have all of the WTC material resifted. Pet. 10 n.2. Whether Petitioners seek re-sifting or not is irrelevant to the issues presented in the petition and to the disposition of the petition.

REASONS FOR DENYING THE PETITION

I. FURTHER REVIEW OF THE SECOND CIRCUIT'S HOLDING THAT NEW YORK LAW DOES NOT PROVIDE PETITIONERS WITH AN ENFORCEABLE CONSTITUTIONAL INTEREST IS NOT WARRANTED

The Court should not grant review of the Second Circuit's holding that Petitioners do not have a cognizable property interest in the undifferentiated mass of WTC material at Fresh Kills. First, the Second Circuit's decision is consistent with the precedent of both this Court and other Courts of Appeals in looking to *state law* to determine whether Petitioners have an enforceable property interest in the WTC material. *See* Sup. Ct. R. 10; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Brotherton v. Cleveland*, 923 F.2d 477, 479 (6th Cir. 1991); *Whaley v. County of Tuscola*, 58 F. 3d 1111, 1113-14 (6th Cir. 1995). And, second, interpretations of state law are typically left to the judgment of the Court of Appeals and the District Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."); *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 462 (1967) (quoting *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534 (1949)) ("'[W]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here.'"); 22 James Wm. Moore et al.,

Moore's Federal Practice, § 405.03[2][a][iv] (3d ed. 2010) ("[T]he Court will not ordinarily grant certiorari . . . to consider questions of state law decided by federal courts of appeals.").

Third, the lower courts' rulings on this question of New York law are unlikely to have any significant impact beyond the unusual facts of this case. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (stating that the Supreme Court does not "sit for the benefit of the particular litigants" but that "'[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic"); *see also* 23 Moore's Federal Practice § 510.41[3][a] (quoting Harlan, *Manning the Dikes*, 13 Record N.Y.C. Bar Ass'n 541, 551 (1958) ("The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari.")). Petitioners' claim that "there is a need for clarity with respect to the due process interest in unidentifiable remains" because our country inevitably will continue to be beset by terrorist attacks and natural and man-made disasters misses the point. Pet. 26. Petitioners cite Hurricane Katrina, California wildfires, and the Deepwater Horizon oil spill as evidence of these continuing threats, but there is no indication that local or national recoveries from any of these disasters would benefit from the resolution of this issue. Even if these disasters presented a similar issue—and they do not—a ruling from this Court as to property interests under New York law would hardly be relevant as to claimed property interests in Louisiana, California, or any other state.

Fourth, the lower courts' interpretation of New York state law on this issue was entirely correct.

New York law recognizes that next of kin have a quasi-property right in the remains of the deceased. *See, e.g.*, *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 244 (E.D.N.Y. 2005). But this right is limited to possession of *identified* remains of one's next of kin for the sole purpose of ensuring a proper burial. Indeed, every case cited by Petitioners involves the possession of *identified* human remains of a particular plaintiff's next of kin. For example, in the cases cited by Petitioner involving cremated remains, there was no dispute that the remains were the next of kin of a particular family member, and thus no need for them to be identified scientifically. *See Schmidt v. Schmidt*, 267 N.Y.S.2d 645 (N.Y. Sup. Ct. 1966); *see also Roach v. Stern*, 675 N.Y.S.2d 133, 134 (2d Dep't 1998). "Without something tangible or identifiable, there is no property right." Pet. App. 25 (citing *Comite En Memoria Del Vuelo 587 Inc. v. Hirsch*, No. 100382/2005 (N.Y. Sup. Ct. April 26, 2005)).

In contrast, Petitioners claim a collective interest in, and seek the excavation and relocation of, *all* of the WTC material in Fresh Kills because the ashen remains of *some* unspecified victims of the WTC attacks *may* be intermingled with the undifferentiated WTC material. As both the Second Circuit and District Court correctly concluded, "[n]o case has extended such a right" to an undifferentiated mass "that may or may not contain undetectable traces of human remains not identifiable to any particular human being." Pet. App. 25 (Southern District of New York); *see also* Pet. App. 5 (Second Circuit). Neither New York law nor the Due Process Clause require the City to excavate more than one million tons of WTC material from Fresh Kills at a tremendous cost to the citizens of New York because there is

a chance that some remains of some unidentified victims may be located there.[5]

Finally, the Court should not review this issue because in the unlikely event that the Court was to conclude that the lower courts erred in their interpretation of New York law, even that conclusion would not alter the outcome. The Second Circuit determined that Petitioners' due process claim also fails on alternative grounds (Pet. App. 5) and Petitioners have not sought review of that ruling. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *see also Glover v. United States*, 531 U.S. 198, 205 (2001). Even if Petitioners had sought review, certiorari would not be appropriate because the Second Circuit correctly applied the Court's well-established precedent. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Only arbitrary and egregious action that shocks the conscience will give rise to a substantive due process claim. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). The Second Circuit properly concluded that Petitioners' claims regarding the City's alleged conduct do not satisfy the standard, holding that "[c]learly, the City acted responsibly, without 'reckless or deliberate

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[5] Petitioners make the conclusory assertion, as they did before the lower courts, that they should have been permitted to conduct discovery to prove their interest in the WTC material. Pet. 24. But no amount of discovery would establish that Petitioners' have an enforceable interest in the WTC material at Fresh Kills. Pet. App. 5 (concluding that Petitioners failed to show "how further discovery would render their claims viable").

indifference that would shock the conscience.'" Pet. App. 6.

Petitioners' allegations evince nothing more than disagreement with the manner in which the City conducted the massive recovery effort and dissatisfaction with the City's subsequent refusal to excavate and relocate the WTC material. However, "[t]here was no protocol on how to respond to the catastrophe suffered by the City." Pet. App. 6, 27. City officials were faced with unprecedented challenges and multiple competing public interests. Amid these responsibilities, "the City acted responsibly" and "sought through all its actions to bring about a swift and efficient recovery from the terrorist attack." Pet. App. 6-7, 27-28. As stated by the Second Circuit,

> To the extent the scene depicted in plaintiffs' complaint "shocks the conscience," it does so because of the magnitude of the events that occurred on September 11, not because of the City's response. As the District Court found, these municipal actions and decisions represent, at most, a lack of due care. Even after the atmosphere of emergency had dissipated, affording a greater opportunity for "actual deliberation," the City's conduct does not amount to "deliberate indifference" to plaintiffs' rights.

Pet. App. 7.

Accordingly, for all of the reasons stated, further review of Petitioners' due process claim is not warranted.

II. THE COURT SHOULD DENY REVIEW OF PETITIONERS' CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRED CITY OFFICIALS TO PROVIDE VICTIMS' FAMILY MEMBERS WITH A HEARING PRIOR TO MAKING DECISIONS REGARDING THE SEARCH AND RECOVERY EFFORT

Petitioners contend that the Court should grant review to consider whether the Due Process Clause obligated the City to provide victims' family members with some type of notice and some form of a hearing before making decisions regarding the manner in which the City conducted the search and recovery effort at Fresh Kills. This issue is not appropriate for review because neither the Second Circuit nor the District Court resolved the issue. *See Pierce Cty. v. Guillen*, 537 U.S. 129, 148 n.10 (2003) ("We ordinarily do not decide in the first instance issues not resolved below and decline to do so here."); *Glover*, 531 U.S. at 205 ("[W]e do not decide questions neither raised nor resolved below."). There was no need to consider this issue once the lower courts concluded that Petitioners do not have an enforceable interest in the WTC material at Fresh Kills. Pet. App. 5, 25.

Even if Petitioners do have an enforceable interest in the WTC material—and they do not (*see supra*)—the City was not required to provide Petitioners with notice or an opportunity to be heard because its actions were "legislative," not "adjudicative." *See, e.g., Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 284 (1984) (policy decision by executive agency would be legislative action); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224,

245 (1973) (proceedings that "adjudicate disputed facts in particular cases" are subject to the requirements of procedural due process); *R.R. Vill. Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1204-05 (2d Cir. 1987). Legislative decisions are government actions of general application that do not rest upon a determination of disputed facts. *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Bowles v. Willingham*, 321 U.S. 503, 519-520 (1944); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 143 (2d Cir. 1994) (citing *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960)). The Due Process Clause only requires an opportunity to be heard when the government action is adjudicative, *i.e.*, the decision is based on a determination of facts. *See Codd v. Velger*, 429 U.S. 624, 627-628 (1977); *Interport Pilots Agency*, 14 F.3d at 142 (citing *Fla. East Coast Ry. Co.*, 410 U.S. at 245).

The City's actions indisputably were generally applicable in that they were not directed at Petitioners. And there were no facts for Petitioners to contest or for an adjudicative process to decide. *See Codd*, 429 U.S. at 627-628. The fact that Petitioners now contend they have been harmed by these decisions does not change the City's "legislative" actions into "adjudicative" ones. *See Interport Pilots*, 14 F.3d at 143-144.

Moreover, in these circumstances, it was simply not practicable to provide any pre-deprivation process. *See FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (where an important government interest is coupled with a need for "prompt action[,] . . . postponing the opportunity to be heard until after the initial deprivation" is constitutionally permissible); *see also Hodel v. Va. Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 299-300 (1981). The City had to search the massive amount of WTC material for evidence and human remains and then quickly place it in designated sections of Fresh Kills to accommodate the search of additional incoming material from the WTC Site. The success of the monumental response and recovery effort at the WTC Site depended upon the efficiency of the effort at Fresh Kills. Halting or delaying recovery operations to provide some unspecified opportunity to be heard to all victims' families would have crippled the entire recovery effort at the expense of the numerous other public interests served by the City's effort. The law does not require such a process. *See FDIC*, 486 U.S. at 240.

III. THE COURT SHOULD DECLINE TO REVIEW WHETHER THE CITY'S RESPONSE TO THE SEPTEMBER 11TH ATTACKS IMPOSED UPON IT A CONSTITUTIONAL DUTY TO TAKE THE ADDITIONAL ACTIONS PETITIONERS DEMAND

Petitioners also contend that the Court should grant review to consider whether the voluntary undertaking of a massive evidence recovery effort, coupled with promises purportedly made by City officials, gave rise to a constitutional duty for the City to perform additional actions demanded by the Petitioners. Pet. 28-30. The Court should decline to review this issue as well because it also was not resolved by the lower courts. *See Pierce Cty.*, 537 U.S. at 148 n.10; *Glover*, 531 U.S. at 205. Again, the lower courts did not need to reach this issue because of their conclusion that Petitioners do not have an enforceable interest in the WTC material. Pet. App. 5, 25.

But even if Petitioners' contentions were properly before the Court, well-settled precedent makes clear that there is no compelling reason for the Court to review this issue. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

Petitioners' claims stem primarily from the City's discretionary decision not to take additional actions such as segregating the fines and maintaining them separately after they were sifted in the process previously described, as well as the City's decision not to excavate the WTC material prior to closure of Fresh Kills. Notwithstanding the discretionary nature of these decisions, Petitioners claim that once the City chose to undertake the recovery effort and made certain alleged promises it was bound by the Due Process Clause to take these additional actions.[6] Petitioners are wrong.

It is well-settled that the Due Process Clause does not confer an affirmative right to governmental aid or assistance. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-757 (2005). Moreover, a government entity's voluntary action in the public interest does not impose upon it a requirement to perform additional actions. *See DeShaney*, 489 U.S. at 197-198; *Brooks v. Giuliani*, 84 F.3d 1454, 1466-67 (2d Cir. 1996); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824 (2d Cir. 1996). Courts also have consistently rejected

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[6] As noted, Petitioners claim that an FBI official, as well as certain City officials, promised them that the fines would not be commingled with other searched WTC material and deposited in Fresh Kills, and Respondents dispute this claim. Pet. 2, 7-8, 29.

the argument that a citizen's reliance on a government official's promises gives rise to a duty under the Due Process Clause. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Keselman v. City of New York*, 179 Fed. Appx. 774, 775 (2d Cir. 2006); *Bright v. Westmoreland County*, 443 F.3d 276, 283-284 (3d Cir. 2006); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995).

Petitioners' contentions amount to no more than second guessing how the City managed the search and recovery operations after the September 11th terrorist attacks. *See, e.g.*, Pet. 29 ("the City . . . designed, implemented, operated, and managed the recovery effort . . . an effort Petitioners contend was inadequate."). Petitioners' dissatisfaction does not create a constitutional duty requiring the City to undertake the additional efforts that Petitioners demand. Thus, the City's alleged failure to accept Petitioners' advice and take these particular actions does not run afoul of the Due Process Clause. Petitioners have failed to provide a single citation to the contrary. Accordingly, this question does not present a conflict among federal courts or an issue of unsettled law worthy of the Court's review. *See* Sup. Ct. R. 10.

IV. THE COURT SHOULD DENY REVIEW BECAUSE THE SECOND CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONERS' FREE EXERCISE CLAIM BASED UPON THIS COURT'S SETTLED JURISPRUDENCE

The Court has long held that laws and executive actions that are "neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990)). Thus, the Second Circuit correctly affirmed the dismissal of Petitioners' free exercise claim because Petitioners concede that the City's purpose in implementing the various search processes at Fresh Kills was to recover human remains, personal effects, and evidence—not to infringe on Petitioners' religious rights. Pet. App. 8. The Second Circuit further concluded that it "need not dwell on the level of scrutiny applicable to the City's actions" because the City's interest in efficiently clearing and searching the WTC material was compelling and, thus, "plaintiffs' free exercise claims fail under any standard." Pet. App. 8, 33 ("The City's actions satisfy both a 'rational basis' and a 'compelling interest' test.").

The Second Circuit's straight-forward application of this Court's well-settled free exercise jurisprudence does not warrant further review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Petitioners do not suggest that the Second Circuit's decision

conflicts with the precedent of this Court or any other court. Instead, Petitioners only suggest that this Court should grant review to opine as to "how central" burial rights are to one's religious tenets. The importance of burial rights to religion is not in dispute. Pet. 34. Nor does it compel a different conclusion than that reached by the lower courts. Indeed, the issue is ultimately irrelevant given the Second Circuit's determination that Petitioners' free exercise claim fails *under any standard* due to the City's compelling interest justifying its actions—a conclusion which Petitioners do not challenge. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The Court should also deny review because the Second Circuit's ruling on this issue will have limited significance outside of the unique context of this case. *See Rice*, 349 U.S. at 74; *see also* 23 Moore's Federal Practice § 510.41[3][a].

CONCLUSION

The tragic events of September 11, 2001, left an indelible mark on the world, our country, and New York City. None have suffered more than the family members who lost loved ones in the horrific attacks. The sorrow and anguish of family members who lost loved ones is both undeniable and unimaginable. That they do not have a body to lay to rest can only magnify their grief. But the inability to recover the remains of some victims does not provide the Petitioners with a constitutional claim requiring the City, at a tremendous cost, to excavate and relocate more than a million tons of WTC material located across 48 acres. Permitting such suits to go forward would cripple the Executive's ability to effectively

respond to a disaster by inviting any individual or group disagreeing with the government's decisions to sue to enjoin the recovery efforts or to seek redress after the fact through litigation. The lower courts correctly held that, in these dire and thankfully rare circumstances, it is not the province of the judiciary to second-guess the efforts of the Executive. For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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